

Jurisdictional Disputes and the Development of Offshore Petroleum Legislation in Australia

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**Submitted in fulfilment of the
requirements for the degree of
Doctor of Philosophy**

University of Tasmania

/ School of Government

September 1998

Declaration

This thesis is a true account of original research undertaken for the degree of PhD, and does not contain material which has been presented to another institution, nor have the findings been published elsewhere, except as otherwise acknowledged in the text.

A handwritten signature in black ink, appearing to read 'Nathan C.', is written over a horizontal line.

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Referencing Style

The referencing style used in this thesis is that employed by The Law Book Company in the serial *Environmental and Planning Law Journal*. For clarification, the expression 'state' is used to identify the subnational sphere of government in Australia and the U.S., while 'State' refers to nations.

Abstract

This thesis examines the reform of the legislative regime for governing offshore oil development on Australia's continental shelf. In particular, the thesis explores how several factors have combined to shape the Commonwealth's offshore petroleum legislation at various stages since its original enactment. The more important of these factors include questions of constitutional law, the impact of the emerging law of the sea, the Commonwealth's policy-making and administrative expertise, and the input of state governments and the oil industry to Commonwealth offshore policy.

The thirty year history of the *Petroleum (Submerged Lands) Act* can be considered as having evolved through four distinct phases. During the 1960s, the Commonwealth legislated to accommodate the states' much greater capacity to administer offshore oil development. The second phase of offshore policy in the 1970s is characterized by the Commonwealth's assertion of its superior legislative capabilities over offshore areas *vis-a-vis* the states. Following the associated inter-governmental tension, the third evolutionary phase in the early 1980s represents a return to a collaborative offshore policy approach. The fourth phase corresponds with the current mature state of the regime wherein the Commonwealth now prevails in offshore petroleum policy but still involves the states directly in continental shelf policy making under Commonwealth law. Despite the responsibilities of the Commonwealth and states shifting over time because of the influence of the factors identified above, the participation of both spheres of government in continental shelf policy has never been seriously doubted. This thesis argues that it is the joint exercise of decision-making powers by the Commonwealth and states that has provided stability to an otherwise volatile area of natural resources policy.

In strictly legal terms, the Commonwealth could have asserted its jurisdiction in respect of the extended continental shelf when it first entered this legislative policy field in 1967. Because of the particular combination of factors prevailing at that time, however, the Commonwealth instead vacated to the states the policy field of offshore petroleum. The early role assumed by the states assured them of continued participation in the Commonwealth's offshore petroleum regime, even after offshore jurisdiction was divided three miles offshore in 1980 as part of the Offshore Constitutional Settlement (OCS).

At the same time, the Commonwealth has come to realize the necessity of state government input to its continental shelf regime. While the Commonwealth has increasingly legislated to reduce the role of the states in offshore petroleum policy, this sphere of government still participates directly in administering the continental shelf regime through the exercise of Commonwealth powers.

That the Commonwealth has progressed its marine resources policies within the context of the OCS without sending Australia back into another phase of offshore disputation testifies to the maturation of this policy area, and the legal and administrative regimes established to govern offshore petroleum development. The thesis shows that the regime established under the *Petroleum (Submerged Lands) Act* has handled jurisdictional issues with a high degree of success through its evolving partnership between the Commonwealth and the states. Although the offshore petroleum regime does have some shortcomings, the legislation nonetheless provides a model by which jurisdictional differences over offshore resources can be overcome. Thus, the offshore petroleum regime established under the OCS arrangements has relevance for other federations struggling with offshore jurisdiction issues, particularly the United States.

Acknowledgements

I cannot claim to have suffered the final write-up dramas typically associated with a PhD. This is due largely to the wonderful folk who have kept vigil with me, and I thank you all in no particular order –

My mother, Helen, has obliged my every whim with selflessness and good nature, and I will always be indebted to you for this, Mum. Likewise, Theo, as brother and mentor you were a motivation to keep me going during those earlier dark days. The same is true of Perthites – M, Darryl, Sar, Ross – you were there when this voyage began back in pre-colonial times, and it is fitting that you help bring this exercise to its conclusion.

More recently, to all you Canberrans, I thank you for your wonderful friendships over the past three to eighteen months. Although you didn't contribute to the thesis you enriched my time here, and have made the hard yards less difficult. For this I truly thank you and will remember you always, it has been a hoot.

And to Sali Jayne, we've come a long way in our quest to save the seas ... thank you for the past and present (including that wretched table of contents!)

Of course, my very great thanks go to Marcus for his supervision and loyalty over the course of my candidature ... it's been fun, Marcus, shall we do it again sometime?

Author Publications

Parts of this work have been published or presented in a number of journals and conferences, as shown below –

- N. Evans, "Jurisdictional Questions and Resource Access in Western Australia's Coastal Zone" (1994) *Coast to Coast '94—A National Coastal Management Conference*, Hobart, Tasmania 29 June–2 July 1994.
- N. Evans, "LOS Convention in Australia and Senate Marine Pollution Inquiry" (1996) 13 *Environmental and Planning Law Journal* 3-5.
- N. Evans, "Federal Marine Policy Developments" (1996) March *Australian Environmental Law News* 4-5.
- N. Evans, "LOSC, Offshore Resources and Australian Marine Policy" (1996) 20 *Marine Policy* 223-227.
- N. Evans, "Offshore Oil Updates" (1996) 15 *Australian Mining and Petroleum Law Association Bulletin* 116-117.
- N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204.*
- N. Evans and S. Bache, "Bycatch of Endangered Species: Jurisdiction and the Management of Fishing Activities" (1997) 14 *Environmental and Planning Law Journal* 468-473.^

* Evans was responsible for all the research, interpretation and writing; Bailey assisted with reviewing drafts and editing.

^ Evans was responsible for descriptions of jurisdictional arrangements in Australian resource regimes, and assisting with analysis and writing; Bache undertook the principal research, interpretation and writing tasks.

Acronyms

AFZ	Australian Fishing Zone
AMEC	Australian Minerals and Energy Council
AMIC	Australian Mining Industry Council
AP(P)EA	Australian Petroleum (Production) Exploration Association
APS	Australian Petroleum Settlement
AGSO	Australian Geological Survey Organisation
CSLNRA	<i>Continental Shelf (Living Natural Resources) Act 1968 (Cth)</i>
CZMA	Coastal Zone Management Act (U.S.)
DFZ	Declared Fishing Zone
DA	designated authority
EEZ	exclusive economic zone
EIA	environmental impact assessment
EIS	environmental impact statement
ESD	Ecologically Sustainable Development
GBR(MPA)	Great Barrier Reef (Marine Park Act)
IGAE	Intergovernmental Agreement on the Environment
JA	joint authority
LOSC	Law of the Sea Convention
MAGOP	Ministerial Advisory Group on Oceans Policy
MARPOL	Convention for the Prevention of Pollution from Ships
OCS	Offshore Constitutional Settlement
PER	public environment report
PMC	Department of the Prime Minister and Cabinet
PMSEC	Prime Minister's Science and Engineering Council
P(SL)A	<i>Petroleum (Submerged Lands) Act 1967 (Cth)</i>
RAC	Resource Assessment Commission
RRT	resource rent tax
SSLA	<i>Seas and Submerged Lands Act 1973 (Cth)</i>
UNCLOS	United Nations Conference on the Law of the Sea

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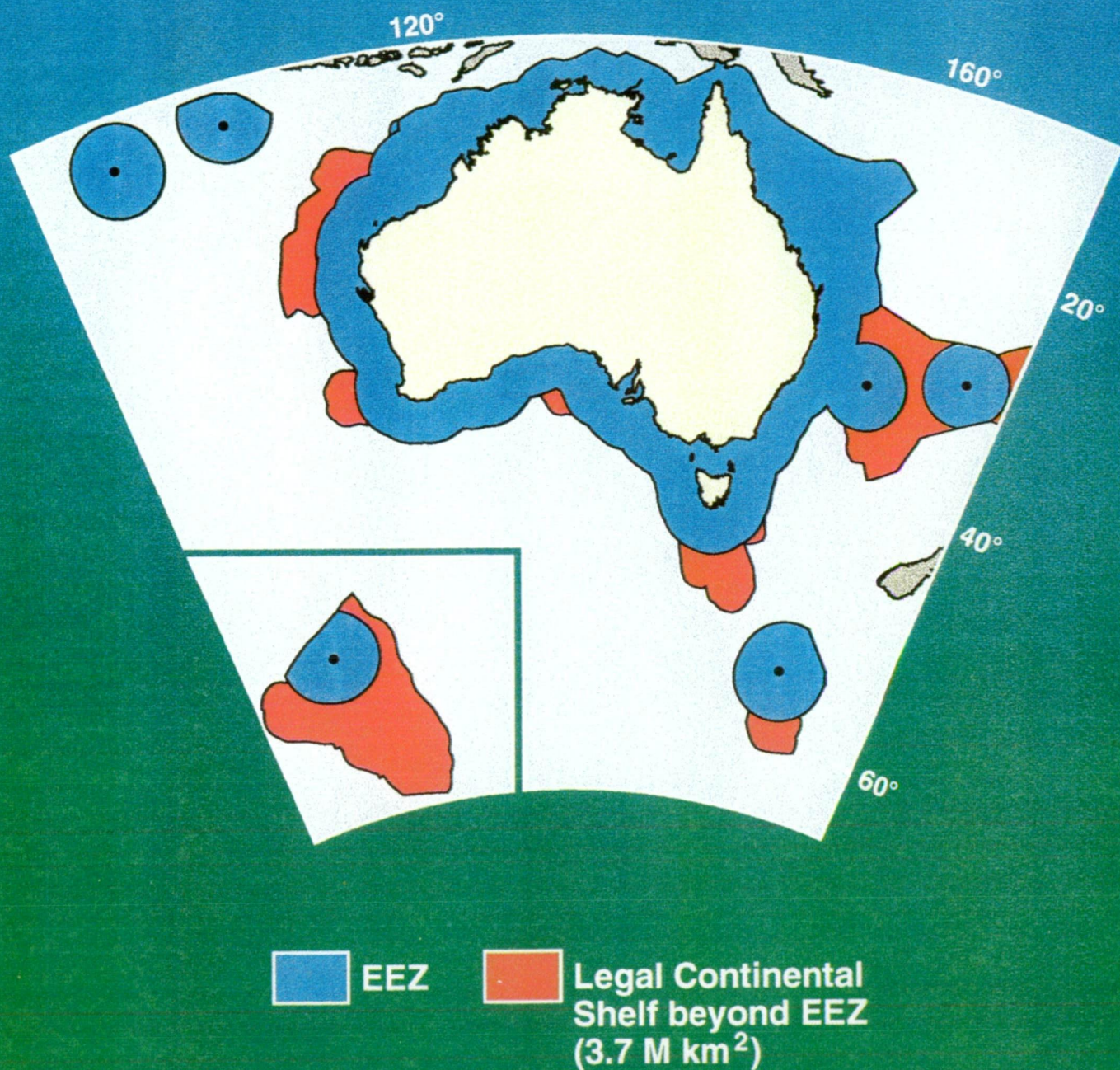
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Definition of Australia's Marine Jurisdiction



Chapter One

Introduction to the Study of Offshore Petroleum Policy in Australia

1.1 THE STUDY IN CONTEXT

This research was inspired by the attention in the literature given to the paralysed condition of the offshore oil development program in the United States. For several decades, the state and federal governments in the U.S. have clashed over the merits of offshore exploitation, especially in relation to oil development on the east and west coasts. It is well reported that many coastal states strongly oppose leasing and development proposals located in adjacent federal waters, but in respect of which they exercise little authority.¹ As a result of intense differences over the use of coastal resources, relations between the two spheres of government have become so bitter that the offshore petroleum regime has "simply broken down."²

¹ B. Cicin-Sain and R. Knecht, "Federalism Under Stress: The Case of Offshore Oil and California", in H. Scheiber (ed), *Perspectives on Federalism* (University of California, Los Angeles, 1987) pp 149-176; E. Fitzgerald, "Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion" (1985) 5 *UCLA Journal of Environmental Law and Policy* 1-47; E. Fitzgerald, "Outer Continental Shelf Oil and Gas Revenues: Coastal States Should Be Entitled to a Share" (1988) 16 *Coastal Management* 319-339; R. Grosso, "Federal Offshore Leasing: States' Concerns Fall on Deaf Ears" (1986) 2 *Journal of Land Use and Environmental Law* 249-285; M. Hershman, "Building a Federal-State Partnership for U.S. Ocean Resource Management", in M. Silva (ed), *Ocean Resources and U.S. Intergovernmental Relations in the 1980s* (Westview Press, Boulder, CO, 1986) pp 221-240; R. Hildreth, "Federal-State Revenue Sharing and Resource Management Under Outer Continental Shelf Lands Act Section 8(g)" (1989) 17 *Coastal Management* 171-191; E. Smith and S. Garcia, "Evolving California Opinion on Offshore Oil Development" (1995) 26 *Ocean and Coastal Management* 41-56; M. Walls, "Federalism and Offshore Oil Leasing Resources for the Future" (1993) 33 *Natural Resources Journal* 776-795; R. Wilder, "Sea-Change from Bush to Clinton: Setting a New Course for Offshore Oil Development and U.S. Energy Policy" (1993) 11 *U.C.L.A. Journal of Environmental Law and Policy* 131-173; R. Wiygul, "The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change" (1992) 12 *Journal of Energy, Natural Resources and Environmental Law* 75-180.

² R. Wilder, "Cooperative Governance, Environmental Policy, and Management of Offshore Oil and Gas in the United States" (1993) 24 *Ocean Development and International Law* 41-62, p 42.

The problems with respect to differences over offshore oil policy in the U.S. derive from the separation of jurisdiction three miles offshore. However, to frame the dysfunctional regime as being an unfortunate but nonetheless inevitable consequence of federation simplifies the character of offshore oil development. Several analyses recognize that the latent tension between the federal and state governments over offshore oil is due to the fact that the benefits of development flow to the former while the latter jurisdiction bears all the costs.³ A range of social, financial and environmental costs are associated with offshore petroleum, including: disruption to local lifestyle; the provision and maintenance of shoreline infrastructure; degradation of amenity value; and damage to the marine and coastal environment.⁴ It follows that by better distributing the costs and benefits within the federal system a more equitable and agreeable regime can be emplaced. Hershman expresses the problem in succinct terms –

This [OCS] policy has been a major source of contention between federal and state governments ... Under current arrangements, states shoulder many of the environmental risks associated with OCS development while sharing few of the financial benefits with the federal government.⁵

In contrast to the acrimony existing around much of the U.S. coastline, the offshore petroleum regime in Australia operates at present unencumbered by inter-governmental tension or conflict. Indeed, during 1998 two separate

³ B. Cicin-Sain, "Ocean Resources and Intergovernmental Relations: An Analysis of the Patterns", in M. Silva (ed), *Ocean Resources and U.S. Intergovernmental Relations in the 1980s* (Westview Press, Boulder, CO, 1986) p 241-262; C. Lester, "Contemporary Federalism and New Regimes of Ocean Governance: Lessons from the Case of Outer Continental Shelf Oil Development" (1994) 23 *Ocean and Coastal Management* 7-47; C. Lester, "Reforming the Offshore Oil and Gas Program: Rediscovering the Public's Interests in the Outer Continental Shelf Lands" (1996) 30 *Ocean and Coastal Management* 1-42.

⁴ R. Gramling, *Oil on the Edge* (State University of New York Press, Syracuse, 1996); R. Knecht, "The Exclusive Economic Zone: A New Opportunity in Federal-State Ocean Relations", in M. Silva (ed), *Ocean Resources and U.S. Intergovernmental Relations in the 1980s* (Westview Press, Boulder, CO, 1986) p 263-273.

⁵ M. Hershman, "Ocean Management Policy Development in Subnational Units of Government: Examples from the United States" (1996) 32 *Ocean and Coastal Management* 25-40, p 29.

international surveys rated the north-west shelf of Australia as the most attractive area in the world for investing exploration dollars.⁶ Because the regime created pursuant to the *Petroleum (Submerged Lands) Act* 1967 (Cth) does work so well, the topic of offshore petroleum policy in Australia has been the subject of little analytical review compared with the situation in the U.S. This is true especially of the period subsequent to 1980 when the Offshore Constitutional Settlement (the OCS) was reached, at which time offshore jurisdiction as between the federal and state governments was finally settled in Australia.⁷

Discussions of the Australian petroleum regime emphasise that its success is due to the offshore mining code created by the *Petroleum (Submerged Lands) Act* which continues unbroken across state and Commonwealth waters [the federal level of government]. Decision-making continuity is achieved by having in place identical state and Commonwealth statutes to create a mirror policy framework on both sides of the three mile jurisdictional divide. The existence of identical legislation exposes operators to a single regulatory regime and provides consistency in title conditions over offshore tracts regardless of the location of prospective wells. It is this feature which many authors maintain underwrites the smooth operation of the Australian petroleum regime.⁸

⁶ "Upstream oil, gas profits top \$2.1 bn but slump looms" *The Australian*, 9 March 1998; "Price drop no barrier to offshore field bids" *The Australian*, 22 June 1998.

⁷ One exception to this generalization is found in White, who in 1994 remarked "... examples of beneficial co-operation are the Offshore Constitutional Settlement and the joint legislation by Commonwealth and States in the *Petroleum (Submerged Lands) Acts*." M. White, *Marine Pollution Laws of the Australasian Region* (The Federation Press, Sydney, 1994) p 195.

⁸ M. Crommelin, "The Mineral Exploration and Production Regime Within the Federal System", in P. Drysdale and H. Shibata (ed), *Federalism and Resource Development: The Australian Case* (George Allen and Unwin, Sydney, 1985); M. Crommelin, "Federal-Regional Cooperation: A Comparative Perspective", in J. Saunders (ed), Papers presented at the 2nd National Conference on Natural Resources Law, 1985 *Managing Natural Resources in a Federal State* (Carswell, Calgary, Canada, 1986) pp 295-321; R. Cullen, "Canada and Australia: A Federal Parting of the Ways" (1989) 18 *Federal Law Review* 68-83; C. Harders, "Commonwealth and State Jurisdiction Over Off-Shore Areas" (1977) 1 *Australian Mining and Petroleum Law Association Journal* 7-16.

Whilst legislative complementarity is certainly a strength of the *Petroleum (Submerged Lands) Act* [hereinafter the P(SL)A] interpretations focusing upon strictly legal aspects of resources titles tend to overlook the form of the regime created thereby. As I have argued elsewhere, it is the vesting in state ministers of Commonwealth executive powers in relation to federal offshore areas which is the foundation upon which the Australian regime operates so successfully.⁹ This empowerment is achieved pursuant to two mechanisms established under the Commonwealth P(SL)A. The more significant of these is the joint authority—a body comprising the relevant Commonwealth and state ministers—through which the states make exploration and production decisions jointly with the Commonwealth in respect of the extended continental shelf. As well, state ministers perform a range of minor functions exclusively on the Commonwealth's behalf acting as the designated authority. After much refinement of these mechanisms the P(SL)A regime can now be considered as entering a condition of maturity.¹⁰

As will be seen, although the resolution of jurisdiction was delayed several decades in Australia, the continental shelf is now well established to be beyond the ordinary decision-making competence of states. This thesis argues that it is the joint exercise of powers and making of policy by both spheres of government that more satisfactorily accounts for the operational success of the offshore petroleum regime, rather more than simply having in place mirror Commonwealth and state legislation. Given the value of offshore petroleum resources, the challenging task is to reconstruct the history of the joint decision-making scheme and to thereby understand why

⁹ N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204.

¹⁰ C. Hunt, "The Offshore Petroleum Regimes of Canada and Australia: Some Comparative Observations" (1990) 9 *Australian Mining and Petroleum Law Association Bulletin* 103-111.

the Commonwealth enacted the P(SL)A, instead of exercising its own exclusive jurisdiction in respect of the continental shelf.

1.2 OVERVIEW OF THE THESIS

1.2.1 Background

A recent review by Juda has documented the forty year evolution of the offshore petroleum regime in the United States.¹¹ This thesis adopts Juda's evolutionary perspective to analyse the development and reform of Commonwealth policy towards offshore petroleum, employing legislation as its unit of analysis. In particular, the thesis examines the enactment and amendment of the *Petroleum (Submerged Lands) Act* since its conception in 1967, including administrative decisions and related judicial determinations. Essentially, the current work is concerned with interpreting the evolution of Commonwealth legislative policy towards offshore petroleum by exploring the particular political circumstances that led to amendment of the P(SL)A.

Legislation represents the clearest expression and record of prevailing government intention in any area of public policy. The P(SL)A therefore provides the ideal lens through which to examine the evolving policy embodied within the offshore petroleum regime. To be sure, governments enunciate policy statements from time to time, but there is little worth in examining such pronouncements separately to legislation because the latter authority serves as the policy framework for action.¹² A leading Australian scholar recognises the intimate relationship between legislation and resources policy –

¹¹ L. Juda, "Ocean Policy, Multi-use Management, and the Cumulative Impact of Piecemeal Change: The Case of the United States Outer Continental Shelf" (1993) 24 *Ocean Development and International Law* 355-376.

¹² M. Hunt, "Government Policy and Legislation Regarding Mineral and Petroleum Resources" (1988) 62 *The Australian Law Journal* 841-862

In a country where natural resources are the subject of extensive government ownership, resources law and public policy are inextricably linked. In the first place, resources law is the instrument for implementation of resources policy. The rights and obligations under resources titles give a much more accurate picture of government policy than most Ministerial statements. A failure to comprehend the policy ramifications of different resource titles makes the achievement of policy goals well nigh impossible. Secondly, resources law imposes severe constraints on resource policy by limiting the freedom of action of both the Commonwealth and the States. Again, a failure to comprehend the significance of these limitations diminishes the likelihood of achievement of policy goals.¹³

Perhaps the most notable feature of Commonwealth offshore resources policy is the diffidence with which this has been progressed through legislation. In fact, the Commonwealth's historic approach towards the offshore has been described as "leisurely".¹⁴ Most commentaries of Australian marine policy have been prepared by legal scholars, and it is unsurprising that these frequently attribute the Commonwealth's legislative inaction to jurisdictional difficulties.¹⁵ The most notable departure from these predominant legal interpretations is doctoral work by Haward.¹⁶ Haward's thesis introduces an analytical framework for interpreting Australian marine policy, comprising such elements as: the politics of Commonwealth/state relations; the exchange between judicial and executive decisions; and the domestic implementation of international treaty law.

This thesis complements and builds upon Haward's work in two important dimensions. Firstly, events are explained from a Commonwealth

¹³ M. Crommelin, "Resources Law and Public Policy" (1983) 15 *The University of Western Australia Law Review* 1-13, p 13.

¹⁴ White, *op cit* fn 7.

¹⁵ See the following discussions: M. Crommelin (1986), *op cit* fn 8; R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (The Federation Press, Sydney, 1990); R. Hildreth, "Managing Ocean Resources: New Zealand and Australia" (1991) 6 *International Journal of Estuarine and Coastal Law* 89-126; R. Lumb, "Australian Coastal Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 370-389; D. Rothwell, "The Legal Framework for Ocean and Coastal Management in Australia" (1996) 33 *Ocean and Coastal Management* 41-61.

¹⁶ M. Haward, *Federalism and the Australian Offshore Constitutional Settlement* (University of Tasmania, PhD thesis, 1992).

perspective rather than that of the states. That is, Haward reports the means by which states have remained viable in marine policy making in spite of increasing federal activity whereas this thesis seeks to understand why the Commonwealth permitted the states a paramount role in offshore policy. The second complementary point is that this thesis focuses upon offshore petroleum policy updated to 1998, whereas Haward examined the broad ambit of marine policy concentrating on the earlier OCS.

As this thesis shows, jurisdictional difficulties—although of doubtless importance—were just one of several factors which influenced Commonwealth legislative policy for nearly four decades. The precise influence of jurisdiction on legislative policy arises from the fact that related uncertainties corresponded with increasing Commonwealth interest in the offshore, and indeed were the logical consequence thereof. It follows, therefore, that jurisdictional uncertainty had eventually to be resolved before the Commonwealth could substantially advance its policies through legislation.

Considerable debate and dispute was devoted towards achieving an ultimate resolution of jurisdiction. However, upon closer inspection it becomes apparent that participation by both governmental spheres in offshore decision making has never been seriously doubted. Reviewing the evolution of the P(SL)A, it can be seen that each phase of development addressed how the two spheres of government could best be involved in petroleum policy given their prevailing circumstances. It is the satisfactory resolution of jurisdiction under the OCS that underpins the functionality of the P(SL)A and the mechanisms through which this is achieved, the joint and designated authorities.

1.2.2 Outline of the thesis

Reform of the offshore petroleum regime has occurred in two distinct periods discussed by this thesis: jurisdictional settlements and regime maturity. The first period, from the early 1950s to the OCS of 1980, was concerned with broadly settling Commonwealth-state jurisdiction over offshore areas. Originally, the Commonwealth left the policy field vacant for the states to occupy, thereby assuring the latter of a substantial continued role in marine resources policy. In terms of policy developments in the 1970s, the legacy of early Commonwealth delays proved difficult to reverse, resulting in bouts of intergovernmental turbulence as the federal government struggled to assert its wishes offshore vis-a-vis the states.

Subsequent to the OCS being settled in 1980, the P(SL)A regime has been amended to enable the Commonwealth to assume an increasingly superior, although non-exclusive, role in policy making with respect to continental shelf petroleum. The Commonwealth has successfully moulded the regime so that both spheres of government now contribute directly to policy development and decision making, but the wishes of the Commonwealth prevail in the event of disagreement. This evolution of the P(SL)A represents the second period of reform, reflecting the Commonwealth's growing confidence and maturity as a legislative policy maker.

The thesis chapters correspond with each of the evolutionary periods of the offshore petroleum regime. This chapter provides the context for the study by introducing the building blocks for understanding reform of the P(SL)A: the Australian Constitution and heads of power relevant to offshore petroleum; international sea law and its effect on Commonwealth legislation; and factors that have influenced the development of Commonwealth legislative policy. The review of the P(SL)A proper commences in Chapter Two, which covers the immediate post-Second World War period until 1967. This period of policy development is best thought of as one of avoidance as

the Commonwealth vacated to state governments the management of fisheries, as well as the rapidly emerging field of offshore petroleum under the Australian Petroleum Settlement. Chapter Three is the antithesis of that earlier period, when two successive governments during the early 1970s sought to assert Commonwealth decision making exclusivity over the offshore. This brief foray—principally under the Whitlam government—proved to be unsustainable, due in no small way to the radical redefining of Commonwealth/state relations it attempted.

Chapter Four documents the period of new federalism after the extreme tension ending with the Fraser government's election at the end of 1975. Notwithstanding the return to the states of offshore responsibilities during this time, the Commonwealth retained for itself considerable decision making capabilities having grown accustomed to the newly found functions mandated under Whitlam. The maturation of the offshore petroleum regime beginning in 1983 under the Hawke Commonwealth is reviewed in Chapter Five. Although initially opposing the OCS enacted by the Fraser government, Hawke learned to understand its constitutional bases and exploit the opportunities it provided to the Commonwealth. During this period offshore petroleum policy became further detached from the basic jurisdictional questions that had hitherto dominated intergovernmental relations over the offshore. It is convenient to consider this period has the climax state of the offshore petroleum regime.

The last two chapters discussed the contemporary period of policy development beginning in 1996. Chapter Six examines the effect of contemporaneous developments on the P(SL)A, mainly the national oceans policy and the Commonwealth resources policy statement. Neither of these initiatives is seen to cause a change in policy direction, but legislative and administrative action has nonetheless been needed to align the P(SL)A with these and other cascading events. In concluding the thesis, Chapter Seven

makes some observations on the evolution and success of the Australian model for offshore hydrocarbon development, especially in comparison with the U.S. approach.

1.3 THE FRAMEWORK FOR COMMONWEALTH LEGISLATIVE POLICY

The framework enabling the enactment of the P(SL)A comprises two sets of immutable parameters: the Australian Constitution and international sea law. The immutability of these documents arises from their status as sources of ultimate legal authority. In its pursuit of offshore petroleum the Commonwealth is essentially unable to alter either the Constitution or LOSC, and must develop policy relying upon the extant provisions of both. On the other hand, the distance from the Parliamentary floor of these parameters ensures that other influences shape the detail of particular legislative proposals. In other words, the Constitution and LOSC set the boundaries for legislative activity while the policy embodied therein is the product of the political context dominating at certain critical junctures. To properly understand the development of legislation it is therefore essential to appreciate both levels of the legislative hierarchy. This part outlines the constitutional framework while 1.4 following is devoted to the minutiae of influences conducive to reform of the P(SL)A.

The first section below introduces the Constitution and the powers to legislate its grants to the Commonwealth. Later discussions canvass in some length the nature and scope of legislative powers, so these provisions are only discussed here briefly. Similarly, section 1.3.2 introduces LOSC and foreshadows its effect on Commonwealth policy without dwelling on the convention's details, which are more suitably reported throughout the relevant parts of the thesis. The third section considers how judicial interpretations of the Constitution—especially those involving questions of

international law—have helped redefine the broad parameters for legislative policy. Notwithstanding its ultra-legal nature, the constitutional framework is shown to be sufficiently flexible to accommodate the vicissitudes of Commonwealth/state interaction. Having framed legislative policy in terms of the Constitution and LOSC, part 1.4 then defines the context for the enactment and amendment of legislation by identifying a range of influences on the P(SL)A, such as Australia's coastal orientation, growing knowledge of legal concepts pertaining to jurisdiction, and Commonwealth offshore expertise.

1.3.1 Introduction to the Constitution

Australia has existed as a federation of six internal states and two territories since the beginning of this century, although colonial origins date back to 1788.¹⁷ The approach taken to offshore jurisdictional settlements, in terms of both policy and legal questions, has been shaped at least in part by historical antecedents. Perhaps the most distinctive feature of the act of federation was the degree to which it preserved significant powers and functions of the states. Contrasting the respective roles of the states in Australia and the U.S., one observer remarked –

Federalism appears to have a more co-operative, or at least consultative, character in Australian than in the United States. Perhaps the concept of States rights retains more appeal because it was never discredited by the institution of slavery. Or perhaps the smaller number of States makes intergovernmental dialogue more feasible. Or perhaps the High Court's more restrained interpretation of the Commonwealth's regulatory powers has discouraged federal action. At any rate, formal consultations between the Commonwealth and State governments seem more common in Australia than federal-State dialogue in the United States.¹⁸

¹⁷ The distinction between the two sub-national levels of government is of little practical relevance. Within the discussion, unless otherwise indicated all references to the states should be read to include the Northern Territory. Of Australia's other internal territories one—the Australian Capital Territory—is landlocked and irrelevant to offshore policy while New South Wales has assumed increasing responsibility for Jervis Bay.

¹⁸ K. Murchison, "Environmental Law in Australia and the United States: A Comparative Overview—Part 1" (1994) 11 *Environmental and Planning Law Journal* 179-192, p 181.

The authoritative source for the strength of Australian states is the Constitution, in particular, the specified legislative powers granted thereunder to the Commonwealth. The most important feature in this regard is that state parliaments may generally legislate with respect to all matters not reserved exclusively to the Commonwealth. The Commonwealth's exclusive powers pertain mainly to places of national purpose—such as land set aside for aviation, defence and communications purposes—and the federal public service.¹⁹ In most areas of policy, therefore, the power to legislate is conferred concurrently upon both levels of government.²⁰

The Commonwealth's concurrent powers relevant to the offshore, as enumerated in section 51 of Part Five of the Constitution, Powers of the Parliament, are reproduced below. Because their application to offshore jurisdiction and resources policy will be seen in later chapters, it is necessary to comment upon these powers only briefly here.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

- (x) Fisheries in Australian waters beyond territorial limits;
- (xxix) External affairs;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopts the law;
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australia;

¹⁹ Australian Constitution, s 52.

²⁰ The power pertaining to navigation and shipping needs to be mentioned for completeness. This power to legislate derives from a combination of common law and section 98 of the Constitution, pursuant to which the trade and commerce power [s 51(i)] is expressed to extend to the making of legislation with respect to shipping and navigation. M. White, *op cit* fn 7.

- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth

In addition to the general concurrency of powers, two other sets of provisions further emphasize the cooperative character of the Constitution. The first are two Commonwealth legislative powers requiring the approval of the states for their exercise, while the other provisions protect the states from arbitrary Commonwealth action. The first-mentioned constitutional provisions are concurrent powers known as the reference and request powers, detailed above.²¹ The reference placticum empowers the Commonwealth to legislate with respect to matters referred by the states, while the request power is triggered at the states' unanimous behest. Legislation may be enacted based upon these heads of powers only at the initiative of the states.

The reference and request powers are obviously curiosities. It seems that these legislative powers were probably included in the Constitution to enable the exchange of responsibilities between the two spheres of government, as is essential in a healthy federation. Notwithstanding the intention of these provisions, Haward notes that their limited use in enacting legislation highlights the reluctance of the states to further expand the Commonwealth's already considerable ability to legislate in most areas of policy.²²

The other two constitutional provisions alluded to above provide for compensation to be payable by the Commonwealth, and circumscribe any unilateral alterations to the states. With respect to compensation, the Constitution restricts the Commonwealth to acquiring land only with

²¹ Plactica 51 (xxxvii) and (xxxviii) respectively of the Constitution.

²² Haward, *op cit* fn 16, pp 170-175.

compensatory action on just terms.²³ The convoluted process for altering the boundaries of states—specified in section 123—renders virtually unalterable any changes to the states as existing at federation.²⁴ As will be seen, these provisions have all been profound in both encouraging and restricting Commonwealth/state interaction in respect of the offshore. More fundamentally, though, the inclusion in the founding document of this array of provisions recognises and protects state interests from Commonwealth legislative excesses. In combination, these provisions make the Australian Constitution a “recipe for decentralization”.²⁵

It is finally important to mention section 109 of the Constitution. This section is critical in clarifying the operation of concurrent legislative powers. Section 109 ensures that in the event of conflict between state legislation and Commonwealth law enacted pursuant to a head of power, the latter will prevail and the state law will be invalid to the extent of the inconsistency. Not surprisingly, the relationship between Commonwealth and state legislation has been the subject of considerable dispute, especially in the areas of offshore jurisdiction, resources policy and environmental law. The nation’s supreme juridical body, the High Court of Australia, has on a number of occasions adjudicated regarding the validity of federal and state legislative claims, described further in the section 1.3.3.²⁶ For the moment it is worth noting that s 109 was not conceived as a counter-veiling force to the cooperative tenet of the Constitution, but was devised much more narrowly

²³ Placticum 51 (xxxi) of the Constitution.

²⁴ Section 123 of the Constitution states: “The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.”

²⁵ R. Cullen, “The Encounter Between Natural Resources and Federalism in Canada and Australia” (1990) 24 *U.B.C. Law Review* 275-305.

²⁶ See, generally: G. Bates, *Environmental Law in Australia* (Butterworths, Sydney, 1992) pp 76-94.

as a mechanism for resolving interaction in respect of particular legislative proposals.

1.3.2 Australia and the Law of the Sea

International law of the sea is relevant to national offshore resources policy for two reasons. Firstly, it provides the universally-agreed framework within which domestic exploitation occurs. Under the Law of the Sea Convention, the development of regulatory regimes is largely devolved to individual nations, unlike the situation regarding fishing and navigation where the international community is heavily involved in specifying rules of conduct.²⁷

Oil and gas exploitation take place within the sovereign power of the coastal state (Art. 2(1), 1958 Continental Shelf Convention; Art. 77 LOSC). This implies that the coastal state is only marginally limited by the rules of international law in the exercise of its sovereign rights over the continental shelf. Hence the regulation of exploitation of the continental shelf takes place to a very large extent within the framework of the national legislation of the coastal state.²⁸

In Australia's case the P(SL)A represents the conversion of international resources law into domestic legislative policy. LOSC is also very apposite to the present study of the P(SL)A for what it reveals about the Commonwealth's policy towards the continental shelf, a product of international treaty law [more in Chapter Two]. It is clearly in a nation's interest to support a convention favourable to its own domestic circumstances, and to this end Australia has been an active participant in negotiating multi-lateral conventions, most notably the Law of the Sea.²⁹

²⁷ T. IJlstra, "Regional Co-operation in the North Sea: An Inquiry" (1988) 3 *International Journal of Estuarine and Coastal Law* 181-207, p 193.

²⁸ Ibid.

²⁹ Australia's approach to the Law of the Sea Convention is returned to several times in the thesis where this helps frame domestic legislation. For discussions of Australian diplomacy generally, see: R. Smyth, N. Plange and N. Burdess, "Big Brother? Australian's Image in the South Pacific" (1997) 51 *Australian Journal of International Affairs* 37-52; R. Woolcott, "Pathways of Modern Diplomacy" (1997) 51 *Australian Journal of International Affairs* 103-108. For a discussion of Australia's role in Antarctic and regional marine policies, see respectively: A. Bergin, "Politics of Antarctic Minerals: The Greening of White Australia" (1991) 26 *Australian Journal of Political Science* 216-239 and A. Bergin and F. Michaelis, "Australia and the South Pacific: Implementing the UNCED Oceans Agenda" (1996) 20

The first LOS Conference was held in 1958. Australia was keen to see a wide definition of the continental shelf adopted at UNCLOS I, a policy described further in the next chapter. Fifteen years later [at the Third Law of the Sea Conference] the Commonwealth's negotiators were very adept at securing provisions beneficial to the country, an especial challenge given the blend of maritime features that needed to be satisfied simultaneously.³⁰ These characteristics included –

- as an island dependent upon shipping trade Australia was careful not to unnecessarily burden vessel traffic;
- the Commonwealth was keen to protect its coastline from the growing incidence of pollution misadventures;
- as a major producer of terrestrial minerals the prospect of a parallel offshore minerals regime posed particular challenges;
- Australia was also in favour of retaining the older 1958 definition of the continental shelf.³¹

The protracted time frame over which negotiations occurred [1973-1982] and the delay in the convention entering into force [1994] is widely known.³² Australia's policy towards LOSC remained unchanged over this extended

Marine Policy 47-62.

³⁰ T. Mensah, "Background to the Law of the Sea Convention - Keynote Address", in M. Tsamenyi, S. Bateman and J. Delaney (ed), *Wollongong Papers on Maritime Policy No. 3 The United Nations Convention on the Law of the Sea: What it means to Australia and Australia's Marine Industries* (Centre for Maritime Policy, University of Wollongong, Wollongong, 1996) pp 9-16.

³¹ A. Bergin, "Australia and Deep Seabed Mining" (1982) 36 *Australian Outlook* 45-50; A. Bergin, "Australia and UNCLOS 3" (1983) 29 *Australian Journal of Political History* 427-439.

³² D. Anderson, "Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea" (1993) 42 *International and Comparative Law Quarterly* 654-664; D. Anderson, "LOS Convention: Status and Prospects" (1994) 18 *Marine Policy* 494-497; D. Anderson, "Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea" (1994) 43 *International and Comparative Law Quarterly* 886-893; W. Burke, "Importance of the 1982 UN Convention on the Law of the Sea and its Future Development" (1996) 27 *Ocean Development and International Law* 1-4; C. Conroy, "The 1982 United Nations Law of the Sea Convention; Entry Into Force and Australian Ratification" (1994) 3 *Australian Environmental Law News* 4-5; T. McDorman, "The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime" (1995) 10 *The International Journal of Marine and Coastal Law* 165-187; I. Shearer, "The United Nations Convention on the Law of the Sea" (1994) 68 *The Australian Law Journal* 308-311.

period, however, in spite of three different Commonwealth governments being in power. Indeed, Suter notes that it is "impossible to detect a change in policy" regardless of the political party in office.³³

The seamless approach towards LOSC is important for what it illustrates about the bipartisan nature of offshore resources policy in the Commonwealth sphere. Although there have been perceptible differences between Liberal Coalition and Labor federal governments towards offshore petroleum, both domestically and in terms of LOSC, these gaps have narrowed during the evolution of the P(SL)A regime. As will become apparent in later chapters of this thesis, Commonwealth offshore petroleum policy has been influenced less by party politics than by the contextual factors shaping policy, introduced below. Likewise, the policies of the states with respect to offshore petroleum have also been bipartisan, reflecting the concerns and aspirations of this governmental sphere rather than being distinguishable by reference to the particular party in power.

Another important point to be made regarding LOSC is the poor linkage between international law and Commonwealth domestic policy. Australia is notable in a world survey for its failure to convert new international maritime codes into federal legislation.³⁴ As Rothwell and Haward remark –

Despite having much to gain from the Convention and being a strong supporter during its negotiation, Australia did not ratify the Convention till 1994.³⁵

Given the considerable benefits to be derived from securing control over offshore areas it is worth considering the Commonwealth's reticence in

³³ K. Suter, *The History of the Development of the Law of the Sea - the Importance for Global Marine Conservation and Recommendations for Australian Action* (World Wildlife Fund for Nature Australia and Humane Society International, Sydney, 1994), p 17.

³⁴ G. Galdorisi and J. Stavridis, "Time to Revisit the Law of the Sea" (1993) 24 *Ocean Development and International Law* 301-315.

³⁵ D. Rothwell and M. Haward, "Federal and International Perspectives on Australia's Maritime Claims" (1996) 20 *Marine Policy* 29-46, p 30.

legislating to this end. A partial explanation is likely found in the Commonwealth's generally cautious approach towards the offshore; it should come as no surprise that national implementation of LOSC has been so delayed in Australia given the history of marine policy development. Another suggestion for the delay experienced by the Commonwealth in legislating to give effect to LOSC pertains to lingering uncertainties over jurisdictional arrangements as settled by the OCS in 1980.³⁶ Although there are some unresolved difficulties presented by offshore jurisdiction these are likely secondary to other policy factors. Perhaps the most significant constraint to swift implementation arises from the fact that the foreign affairs portfolio dominated the Australian delegation to LOSC negotiating sessions whilst devoting scant attention to the administrative arrangements needed for implementation.³⁷ Also, the convention is a package of mixed duties and obligations and the Commonwealth—like most of the developed world—is reluctant to support the package in entirety, especially in light of emergent legal precedents such as presented by the Teoh case.³⁸ The Commonwealth's general diplomacy with respect to international treaties, coupled with the desire to secure increased benefits over offshore resources while minimizing the international burdens associated therewith, seem to adequately explain Australia's eventual ratification of LOSC.

As commented elsewhere by this author and others, the Commonwealth has recently legislated to avail itself of the benefits under LOSC relating to the

³⁶ A. Bergin and M. Haward, "Australia's Approach to High Seas Fishing" (1995) 10 *The International Journal of Marine and Coastal Law* 349-367, fn 2.

³⁷ R. Boardman, *Global Regimes and Nation-States: Environmental Issues in Australian Politics* (Carleton University Press, Ottawa, 1990).

³⁸ H. Burmester, "Australia and the Law of the Sea - The Protection and Preservation of the Marine Environment", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 439-455; M. Herriman, "The Law of the Sea—A Delicate Balance of Rights and Responsibilities", in D. Tarte and P. Eiser (ed), *Occasional Paper Number 7 Development of an Oceans Policy for Australia* (Australian Committee for IUCN, Sydney, 1997) pp 21-31.

continental shelf.³⁹ The enabling legislation has maximized controls over offshore petroleum without offending domestic arrangements for its exploitation, nor triggered judicial review. Whilst this approach reveals the clearest intention and maturity of the Commonwealth as a legislative policy maker it also highlights the highly settled state of affairs regarding offshore jurisdiction.

1.3.3 The High Court and judicial activism

The third element of the constitutional framework for the P(SL)A is High Court decision making. The High Court has traditionally held an enviable reputation for its application of strict legalism principles to judgements over the validity of Commonwealth and state legislation.⁴⁰ With respect to decisions over interpretations of constitutional provisions, one observer notes that –

The intention is to be ascertained from the ordinary and natural meaning of the words themselves, relying on the proper legal methods of construction and interpretation.⁴¹

Over the past ten years or so, there are perceptions that the High Court's reputation has been tarnished by a growing elasticity in applying this strict legalistic doctrine. A number of high profile cases have revolved around liberal interpretations of common law theories and the reach of the Commonwealth's legislative power, which in combination represent a distinctive departure from established legal precedents. These inconsistencies

³⁹ P. Brazil, "UNCLOS Comes into Force - Implications for Mining" (1995) 14 *Australian Mining and Petroleum Law Association Bulletin* 1-3; N. Evans, "LOSC, Offshore Resources and Australian Marine Policy" (1996) 20 *Marine Policy* 223-227; D. Rothwell, "Australia and the United Nations Convention on the Law of the Sea" (1994) *International Law News* 30-35.

⁴⁰ S. Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" (1987) 7 *Federal Law Review* 162-198; B. Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, St Lucia, 1987).

⁴¹ H. Patapan, "The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia" (1997) 25 *Federal Law Review* 211-235, p 211.

arise from the High Court's occasional tendency to rule along apparent policy lines, as well as according to strictly legal theories.⁴² In turn, heated accusations from both scholars and politicians have been directed at the High Court for straying into the realm of policy making, the province of elected governments.⁴³ Cullen has remarked that the written word of the Constitution has over time become less important in resolving political control over resources than drafters had originally anticipated.⁴⁴

The High Court's judicial activism comes from its willingness to shape the operation of section 109 so as to give maximum effect to Commonwealth legislation. Where the Commonwealth evinces an intention to occupy an area of policy through the enactment of legislation the High Court has increasingly determined that no state law may enter into that same area. It is through positive interpretations of Commonwealth legislative policy, especially in relation to the external affairs power, that the nexus of power has generally shifted to the centre of the federation.

The most expeditious affirmation of Commonwealth legislative paramountcy has been witnessed in the area of the environment. Beginning with Whitlam's Prime Ministership in the mid-1970s, the Commonwealth has assumed expansive environmental policy-making capabilities by displacing these same functions of the states. The avenue through which this has principally been achieved is the enactment of legislation based upon the external affairs head of power, s 51(xxix).⁴⁵ Over the past twenty years—and at an especially accelerated pace since the mid-1980s—environmental policy has

⁴² P. Goldsworthy, "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Seas and Submerged Lands Act Case (State of New South Wales and Ors v. the Commonwealth of Australia)" (1976) 50 *The Australian Law Journal* 175-184.

⁴³ See the following comments: "Courting a proper, mature relationship" *The Australian*, 24 September 1997; "The jury is out" *The Weekend Australian*, 10-11 January 1998.

⁴⁴ Cullen, *op cit* fn 25.

⁴⁵ See: Bates, *op cit* fn 26 and references contained therein.

become highly globalized with a commensurate proliferation of international environmental treaties.⁴⁶

The Commonwealth displays a strong commitment to discharging its domestic responsibilities relating to international law, a view in which it is concurred by the High Court. Perhaps the most pivotal determination of the potential ambit of the external affairs power was the 1983 Franklin Dams case. This judgement confirmed that the Commonwealth was able to halt construction of a dam in Tasmania by legislating to give effect to the World Heritage Convention.⁴⁷ As a result of this and subsequent decisions, it is now well established that the Commonwealth can extend its legislative capacity into virtually any field by incurring international treaty obligations.

The effect of judicial determinations are not always welcome by the Commonwealth, however. A 1995 decision by the Federal Court of Australia—the Gunn's case—exposed to environmental scrutiny a range of resource decisions which previously had been immune to external oversight.⁴⁸ As shown in Chapter Six, it was this decision which in part compelled the first statutory environmental review of an offshore petroleum proposal located in Commonwealth waters.⁴⁹ The High Court has also interpreted the application of international treaty law to the Commonwealth's disfavour. In the recent Teoh case the High Court determined that the Commonwealth is bound by the duties and obligations

⁴⁶ D. Freestone, "The Road From Rio: International Environmental Law After the Earth Summit" (1994) 6 *Journal of Environmental Law* 193-218; M. Tsamenyi, "Trends in International Law Making: Implications for the Mining, Petroleum and Energy Industries in Australia" (1996) 15 *Australian Mining and Petroleum Law Association Bulletin* 118-120; D. Rothwell and B. Boer, "From the Franklin to Berlin: The Internationalisation of Australian Environmental Law and Policy" (1995) 17 *Sydney Law Review* 242-277.

⁴⁷ *Commonwealth v Tasmania* (1983) 46 ALR 625.

⁴⁸ *Tasmanian Conservation Trust v Minister for Resources*, Unreported, Federal Court of Australia, 10 January 1995. See also: J. McDonald and S. Munchenberg, "Public Interest Environmental Litigation-Chipping Away at Procedural Obstacles" (1995) 12 *Environmental and Planning Law Journal* 140-147.

⁴⁹ N. Evans, "Offshore Oil Updates" (1996) 15 *Australian Mining and Petroleum Law Association Bulletin* 116-117.

arising from conventions even in the absence of implementing legislation.⁵⁰ Federal governments of both persuasion have since introduced bills to overturn this particular ruling, insisting that the High Court has overstepped the boundaries between judicial and administrative decision making.⁵¹

The situation with respect to jurisdiction over the offshore has similarly been shaped by interpretations of international treaty law. The *Seas and Submerged Lands Act* (1973) Cth, the cornerstone of Whitlam's offshore policy, was enacted and subsequently upheld by the High Court based upon s 51(xxix) of the Constitution.⁵² As will be seen, so profound was this judgement that it was to later frustrate the Commonwealth's efforts to circumvent the essence of the High Court ruling and return some offshore authority to the states under the OCS. As intimated earlier though, the Commonwealth has generally not been so adventurous in advancing offshore resources policy through the national expression of international law.

Whilst the legislation underpinning the OCS has not been directly reviewed by the High Court, a number of related judgements have commented favourably on the fabric of the offshore arrangements created thereby [more later]. The mid-1980s also witnessed a brief period of superior court cases between the state of Victoria and the Commonwealth in relation to provisions of the P(SL)A and the powers it gives to the joint and designated authorities. Chapter Five shows that the Commonwealth response to much of this litigation was to amend the P(SL)A to put beyond doubt its role in offshore petroleum policy.

⁵⁰ *Minister for Aboriginal Affairs v Teoh* (1995) 128 ALR 335.

⁵¹ The Keating Labor government introduced the *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth), which was passed by the House of Representatives on 29 June 1995 but lapsed after being referred to the Senate Legal and Constitutional Legislation Committee. On 18 August 1997, the Howard Liberal government introduced another bill of the same name which at the time of writing had not been enacted.

⁵² *New South Wales v the Commonwealth* 135 CLR 337.

From this brief overview of the role of parliament and the courts in environmental and offshore resources policy it can be seen that judicial determinations seldom prescribe Commonwealth and state responsibilities, nor finalize boundaries between the two spheres. Court decisions plainly feed back into the political system through a decision-making loop, often leading to political accommodation rather than finally settling jurisdictional disputes.⁵³ Indeed, Collins remarks that the aftermath of a judgement is as worthy of interpretation as the arguments leading to the initial decision.⁵⁴

Other than Haward's work, the relationship between judicial review and intergovernmental interaction in offshore policy has been little studied within the Australian context.⁵⁵ He argues that the effect of High Court action confirming Commonwealth paramountcy has been to entrench the role of the states in broad policy through intergovernmental feedback. This eventual outcome occurred subsequent to both the Franklin Dams and Seas and Submerged Lands cases.

Reviewing the role of the Constitution in respect of U.S. offshore relations, Anton argued that the form of policy making acceptable to both spheres of government is arrived at less through literal interpretations than by procedural means. That is, limitations on the exercise of federal authority are determined by state participation in the workings of the federal government without there being defined an exact blend between national purpose and states' rights. According to Anton, the Constitution is

⁵³ As discussed in the next chapter, the notion of political accommodation has been employed by one commentator to frame the first period of offshore petroleum policy in the mid-1960s when the Commonwealth entered into the generous Australian Petroleum Settlement. J. Taylor, "The Settlement of Disputes Between Federal and State Governments Concerning Offshore Petroleum Resources: Accommodation or Adjudication?" (1970) 11 *Harvard International Law Journal* 358-399.

⁵⁴ H. Collins, "Federalism, the States and International Affairs", in B. Galligan (ed), *Australian Federalism* (Longman Cheshire, Melbourne, 1989) pp 184-191.

⁵⁵ Haward, *op cit* fn 16, pp 30-40.

sufficiently ambiguous to allow accommodation according to whatever is permissible given the prevailing national mood –

The most important contribution of the Constitution, however, is not some set of imaginary principles by which to determine the allocation of power, but a framework to guide the continuing debate of who should do what. The Constitution does not answer questions of power allocation so much as it provides a structure through which answers can be found.⁵⁶

Anton's interpretation of the constitutional shaping of U.S. intergovernmental relations captures the essence of Commonwealth/state interaction in respect of offshore petroleum in Australia. The Constitution provides the rigid parameters within which the spheres of government interact, but the actual allocation and exercise of power thereunder is influenced by several contextual factors, which the thesis now introduces.

1.4 CONTEXTUAL INFLUENCES ON COMMONWEALTH LEGISLATIVE POLICY

The previous sections have introduced two sets of parameters—the Constitution and LOSC—that have served as the framework for intergovernmental relations offshore. This part identifies five factors which have influenced the evolution of the P(SL)A within this constitutional framework. Unlike broad factors such as heads of power and international legal provisions which define the boundaries for Commonwealth/state interaction, the influences introduced here are understood by reference to each phase of the P(SL)A's evolution. That is, in various combinations these five influences provide the explanatory context for how law and politics

⁵⁶ T. Anton, "Models of American Intergovernmental Relations", in M. Silva (ed), *Ocean Resources and U.S. Intergovernmental Relations in the 1980s* (Westview Press, Boulder, 1986) pp 1-36.

evolved at each phase to determine the form of the P(SL)A which emerged at that time.

1.4.1 Extent of Australia's maritime domain

The geographical basis to Commonwealth/state offshore relations is the country's vast coastline and control over adjacent offshore areas. Very few scholars have recognised the basic geopolitical fact that every Australian state has a long coastal margin, with attendant responsibilities for marine affairs, an oversight reflecting the legal orientation of most historical analyses. Any Commonwealth decision affecting offshore areas is therefore felt nationwide. Because the coastline is divided among all states—in other words, every Australian state has an offshore personality—the history of offshore settlements is largely characterised by state government unity in terms of their interaction with the Commonwealth. Opeskin and Rothwell articulate this influence in the following terms –

Unlike the United States of America and Canada, all of the Australian states have extensive coastlines, a fact that has lent particularly sharp focus to disputes between the federal and state governments over sovereignty and the use of the territorial sea.⁵⁷

As will become apparent, the states for some considerable time provided a powerful counter to the Commonwealth's offshore aspirations, due to their experience in marine resources management. The colonies all had active interests in offshore fisheries prior to federation, a situation preserved in 1901 by the Constitution [s 51(x)].⁵⁸ During the 1950s and 1960s when the Commonwealth entered the marine resources policy field, the states were united in their approach to obtain substantial controls over developmental fisheries and petroleum regimes. In this regard, the states were strengthened

⁵⁷ B. Opeskin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395-431, p 396.

⁵⁸ M. Haward, "The Commonwealth in Australian Fisheries Management: 1955-1995" (1995) 2 *The Australasian Journal of Natural Resources Law and Policy* 313-325.

in their claims to manage offshore resources because of the Commonwealth's own inabilities in this same area, a complementary factor introduced below.

It is only since the OCS of 1980 that this unified alliance of states has dissolved somewhat, attributable to two particular developments. Firstly, since broad offshore responsibilities were finally settled, marine policy has developed in distinctly sectoral patterns contrary to the intention of the OCS.⁵⁹ Also, as the viability of offshore prospects around the coastline has been disproved states have become disinterested in maintaining a national approach towards offshore oil. These two developments in particular are detailed at length in Chapter Five.

In the event of offshore claims being reopened, however, it is conceivable that the states may again find unite in their negotiations with the Commonwealth because of the general commonality of state interests in relation to adjacent maritime zones. Such a proposition is supported by Burmester, who acknowledges that Australia's extensive coastline and the federal system of government present problems for legislative policy, but that the Commonwealth's approach has been to address matters on a "purely functional basis."⁶⁰ Therefore, an issue affecting ocean and coastal policy broadly would be expected to elicit responses from all Australian states.

1.4.2 Industry pressures and relations with the Commonwealth

A well recognised influence on the early development of the P(SL)A was the context created by the pressing requirement to provide security of title over offshore tracts.⁶¹ As interest in the prospectivity of the Bass Strait oil fields

⁵⁹ M. Haward, "The Australian Offshore Constitutional Settlement" (1989) 13 *Marine Policy* 334-348.

⁶⁰ H. Burmester, "Australia and the Law of the Sea", in J. Crawford and D. Rothwell (ed), *The Law of the Sea in the Asia Pacific Region* (Kluwer Academic Publishers, Dordrecht, 1995) pp 51-64, p 53.

⁶¹ See: M. Crommelin, "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 *Australian Mining and Petroleum Law Journal* 191-213; Cullen, op cit fn 15; C. Harders, "Australia's Offshore Petroleum Legislation: A Survey of its Constitutional and its Federal

burgeoned in the mid-1960s, pressure mounted on the Commonwealth and Victoria to guarantee operators the security of newly granted titles. The enactment of legislation in 1967 immediately satisfied this requirement, if only temporarily. Following a Senate inquiry in 1970, doubts were cast upon the security of offshore titles which in turn encouraged the Commonwealth to assert itself offshore, thereby instilling in operators further doubt as to the security of their titles.

Even the lauded OCS failed to convince offshore prospectors of the stability of the regime. For those shouldering the risks of exploration and production the settlement was viewed as just another stage in the saga over offshore oil.⁶² The festering concern over title security was re-ignited with the election in 1983 of the Hawke federal government, and the commensurate deterioration of its relationship with state administrators of the offshore regime. Orchison describes this situation as a "complex triangular relationship between the petroleum industry, the Federal Government and the State Governments".⁶³

As will be seen, oil companies in 1967 prevailed upon the Commonwealth to enact a regime that granted extremely generous terms of access, which they were able to do as a function of both their own influence and the Commonwealth's lack of assertiveness. Subsequent to that time, the Commonwealth has continuously redefined its relationship with the oil industry by enacting provisions to impose upon operators clear policy priorities, often to the latter's disapproval. As a consequence, relations between the Commonwealth and industry have become increasingly strained at different times, exacerbated by particular political climates prevailing at

Features" (1968) 6 *Melbourne University Law Review* 415-428.

⁶² K. Orchison, "Petroleum Exploration Offshore", in "Occasional Papers in Maritime Studies" *Australia's Maritime Horizons in the 1980s* (Australian Centre for Maritime Studies, Canberra, 1982) pp 66-71.

⁶³ *Ibid*, p 70.

certain times. Throughout the evolution of the P(SL)A, though, state/industry relations have always remained stable, a fact commented upon by Stevenson –

The petroleum industry thus has a strongly favourable impression of state governments, unmixed with any perceptions of actual or potential conflict. The widely held belief, in Canberra and in the Labor Party, that a cosy alliance exists between state governments and ‘the multinationals’ has a large element of truth when applied to the petroleum industry.⁶⁴

1.4.3 Jurisdictional uncertainty

As with the need to provide security of title, jurisdictional uncertainties have provided the context for each evolutionary phase of the P(SL)A and also followed a not dissimilar pattern.⁶⁵ At each critical juncture of the offshore history—the 1967 settlement, enactment of the *Seas and Submerged Lands Act*, the OCS—jurisdictional uncertainties emerge as powerful influences on the P(SL)A regime. Commensurate with the resolution of jurisdiction over time, these uncertainties appear to become less relevant as a context for influencing inter-governmental interaction.

A better appreciation of the influence played by jurisdiction is that whilst the intensity of debate has clearly reduced over time, so too has the method of resolution changed. As will be described, decision-making as between the two spheres of government has continued to shift within the P(SL)A regime since basic jurisdictional questions were belatedly settled in 1980.⁶⁶ The means for shifting Commonwealth/state responsibilities has been to amend the regime from within rather than confronting basic jurisdictional questions and risk reopening another chapter in the offshore saga. The context for these more

⁶⁴ G. Stevenson, *Mineral Resources and Australian Federalism* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1976), p 75.

⁶⁵ Crommelin, op cit fn 61; Cullen, op cit fn 15.

⁶⁶ Evans and Bailey, op cit fn 9.

recent legislative amendments is to be found partly in improved Commonwealth policy-making capabilities, introduced below.

1.4.4 Federalism and intergovernmental relations

The fourth and richest factor for understanding reform of the P(SL)A concerns how well Commonwealth and state governments relate at ministerial and bureaucratic levels within the context of changing perceptions of federalism. The currents of federalism have “ebbed and flowed” between Canberra and state capitals as a result of political swings, with obvious ramifications for marine policy.⁶⁷ These federalism movements in turn influence the relationship between ministers and officials from both spheres of government.

Most authors tend to consider only the forces of federalism and centralism flowing at particular times.⁶⁸ Cullen, for example, exhorts a greater devolution of authority from the Commonwealth back to the periphery.⁶⁹ On the other hand, Crommelin supports diversity in governmental responses and seems content to allow centralizing tendencies to continue.⁷⁰ As this author has commented in the literature, casting Australian offshore policy in these terms tends to take an unnecessarily pessimistic view of any difficulties presented by the vertical separation of powers.⁷¹

A more useful contribution for understanding Commonwealth/state relations is made by Haward, who identifies intergovernmental fora as the outcome of continuous shifts in national political mood.⁷² The mechanism

⁶⁷ P. Weller, *Malcolm Fraser PM: A Study in Prime Ministerial Power in Australia* (Penguin, Ringwood, 1989).

⁶⁸ Framing intergovernmental interaction in this manner equates to Sawyer's notions of organic and cooperative federalism. Sawyer, G., *Federalism Under Strain: Australia 1972-1975* (Melbourne University Press, Melbourne, 1977).

⁶⁹ Cullen, op cit fn 25.

⁷⁰ Crommelin, op cit fn 8.

⁷¹ Evans and Bailey, op cit fn 9.

⁷² In his thesis, Haward shows how the relative success of the states in maintaining an

commonly used to harmonise Commonwealth/state interaction in Australia is the ministerial council, although the role of senior officials acting through standing committees is equally crucial to the successful administration of these bodies.⁷³ Because intergovernmental fora require direct exchange amongst ministers and officials personal dynamics must necessarily influence the policies that emerge during movement along the centralism-federalism spectrum.

In a recent paper, Haward advocated the continued development of such intergovernmental fora in Australia –

Given that all spheres of government have interests and responsibilities for aspects of ocean and coastal policy in Australia it is not surprising that intergovernmental relations loom large in the development and implementation of policies. While recognising the realities posed by a federal constitution, identification of the opportunities posed by intergovernmental institutional arrangements is important. These opportunities include facilitating interaction between officials and providing a means to operationise 'political will' in cross-jurisdictional policy areas. Recognising the role of such arrangements overcomes, in part, criticisms of excessive 'overlap' and/or 'duplication' between Commonwealth and State governments. Overlapping responsibility can provide for increased innovation and responsiveness and, arguably, can improve policy making and implementation.⁷⁴

The cordiality or volatility of Commonwealth/state relations generally coincides with and reflects the prevailing variant of federalism, as filtered through the sympathies of state and federal governments. To be sure, during the formative years of the petroleum regime there was a clear alignment of policy along party lines. Over time, this philosophy has been superseded by the distinction of policies according to the sphere of government rather than their partisan political affiliation. In Stevenson's words "vertical conflict is

offshore identity was due largely to their ability to work through intergovernmental processes and institutions; M. Haward, *op cit* fn 16.

⁷³ *Ibid*, pp 40-60.

⁷⁴ M. Haward, "Institutional Framework for Australian Ocean and Coastal Management" (1996) 33 *Ocean and Coastal Management* 19-39, p 20.

reduced, although not eliminated, when governments are controlled by the same party."⁷⁵

At certain periods the personalities of key players has further enhanced and aggravated dominant centralist or federalist tendencies. This meshing of personal and political influences occurred most visibly at several phases of the P(SL)A evolution. For instance, close relations between the Prime Minister and Premiers of oil-producing states produced outcomes favourable to Victoria and Western Australia on two identifiable occasions, 1967 and 1982 respectively. The opposite effect is also observed. Strained relations between leaders of Labor state and federal governments provide the context for interpreting Commonwealth legislative and administrative action during the 1980s when much of the states' lingering decision-making exclusivity was displaced by the Commonwealth.

It is finally worth commenting that intergovernmental agreements are primarily political means by which to achieve cooperation, because of which the decisions of most ministerial councils are legally unenforceable.⁷⁶ Australian superior courts have therefore tended to support intergovernmental fora—quite strongly at times—but without giving these the imprimatur of legal endorsement.⁷⁷ As this thesis argues, the P(SL)A establishes several devices for achieving intergovernmental cooperation with respect to offshore petroleum policy. Most notable of these is the joint authority, however its subcommittee and the designated authority are also highly specialized mechanisms for policy sharing between the Commonwealth and states. Unlike most ministerial councils however, these devices are all the creation of legislation and their powers and functions are

⁷⁵ Stevenson, *op cit* fn 64, p 5.

⁷⁶ Crommelin, *op cit* fn 61.

⁷⁷ A. Gardner, "Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada" (1994) 11 *Environmental and Planning Law Journal* 104-136.

tightly prescribed in law. It is precisely because of this statutory basis that the P(SL)A has been amended to allow the Commonwealth to reallocate the roles of the joint and designated authorities and government officials in policy making.

1.4.5 Commonwealth offshore capabilities

A final influence on the evolution of the P(SL)A is the Commonwealth's capability to regulate offshore petroleum. The context within which the legislation was first enacted was notable for the absence of any federal technical or administrative skills. Regardless of the influences at work in the 1960s, the Commonwealth quite simply could not assume responsibility for regulating offshore petroleum nor setting policy, a position from which it for some time struggled to recover.⁷⁸

Nonetheless, Commonwealth capabilities in this area have grown commensurate with its experience. The states are now less essential as administrators of the offshore regime.⁷⁹ Importantly though, participation by the states in respect of continental shelf decision making has never been doubted despite the Commonwealth's improved economic and technical capabilities. Indeed, the very fact that the Commonwealth has succeeded in balancing state input to its own policy development testifies to the former's decision-making capabilities.⁸⁰ Each phase of the P(SL)A's evolution needs to therefore be placed in the context of the Commonwealth's capability to enact and administer offshore petroleum legislation.

This chapter has introduced the elements necessary to explore the proposition underpinning the thesis—that the efficacy of the offshore

⁷⁸ P. Reid, "Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone or Millstone?" (1980) 2 *Australian Mining and Petroleum Law Journal* 58-76.

⁷⁹ Hunt, *op cit* fn 10.

⁸⁰ Evans and Bailey, *op cit* fn 9.

petroleum regime is found in the joint sharing of policy and decision making powers between the federal and state governments, but which has evolved over time to its present form wherein the Commonwealth may now exert ultimate supremacy. The Constitution and LOSC provide the framework for the enactment and administration of Commonwealth legislation. By reviewing the P(SL)A within the context of particular influential factors over time, it is possible to understand how the legislative regime has evolved within this constitutional setting.

The thesis now turns to examine the first evolutionary phase of offshore petroleum policy in Australia, covering the period 1945 to 1967. This phase represents the first foray by the Commonwealth into the area of marine policy. During the corresponding period in the United States the federal government asserted its rights over the continental shelf through presidential proclamation and subsequent legislation, irrespective of states' wishes. In Australia, the influences identified above conspired against the Commonwealth taking assertive legislative action and the states—being better prepared for the offshore boom—instead assumed a substantial role in petroleum policy making and administration.

Chapter Two

The First Phase of Offshore Jurisdiction - 1945-1967

Despite having legislative powers with respect to the offshore, it was only in concert with growing international expressions of interest in marine resources following the Second World War that the Commonwealth moved tentatively to take advantage of newly accepted concepts of offshore jurisdiction. Unlike the jurisdictional assertions made by other claimant nations during the 1940s and 1950s, however, the Commonwealth's actions to improve its control over resources were motivated by neither a desire to expand its general capacity in this area, nor to usurp existing state roles. Rather, the Commonwealth acted—after some considerable delay—for two ostensible reasons concerning fisheries management: to fill a vacuum in the national system of fisheries laws; and to close jurisdictional gaps existing in an international sense which formative international law made permissible.

The enactment of legislation to this end during the 1950s represents, at best, a cautious foray by the Commonwealth into a new policy area.¹ When considered in terms of UNCLOS developments pertaining to the continental shelf, and the failure to link these to related domestic initiatives, the Commonwealth's legislative approach towards marine policy appears deficient. That the Commonwealth so lacked confidence at the time was simply the outcome of its historical absence from the field of marine resources policy.

¹ This same interpretation of Commonwealth marine policy in relation to territorial sea developments was made forty years later: "Australia's decision ... demonstrates a fairly cautious approach to Australia's law of the sea policy interests." A. Bergin, "Australia Extends Territorial Sea to 12 Nautical Miles" (1991) 6 *International Journal of Estuarine and Coastal Law* 127-132, p 131.

Given these antecedents, it is unsurprisingly that the Commonwealth's minor role in marine policy was perpetuated during the second significant event of this developmental phase of offshore policy. The Australian Petroleum Settlement, an elaborate regime agreed upon by all governments in 1967, vested almost exclusive administration and control over offshore petroleum in the states. It is well recognised that the form the Settlement took in 1967 reflected uncertainties over offshore jurisdiction, and the pressing need to provide security of title to operators.² Less well appreciated, however, are the several other influences which shaped the Settlement. These factors include the Commonwealth's deference to states' decision making superiority, and its compliance with state government and industry desires over the eventual form of the regime.

The 1967 Settlement had the effect of securing the states as offshore policy makers. Several decades—and renegotiations of offshore positions—would pass before the Commonwealth was able to emplace a sustainable legislative regime wherein it exerted any substantial decision making powers. The main consequence of the 1967 Settlement, therefore, was that it established parameters—legal, political and industrial—for intergovernmental interaction with respect to offshore oil policy which have in varying degrees endured to the present day. Put another way, the partnership approach of the current P(SL)A regime derives its basis from developments begun in the mid-1950s. The three significant events of this first offshore phase—international maritime treaties, Commonwealth fisheries legislation and the 1967 Settlement—are examined here as an insight into better understanding the evolution of the offshore petroleum legislation.

² R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (The Federation Press, Sydney, 1990) pp 61-63, 71.

2.1 EMERGENCE OF THE CONTINENTAL SHELF

2.1.1 1958 United Nations Conference on the Law of the Sea

Perhaps the first substantive development in the corpus of international maritime law dates back to 15th Century Europe, and the contributions made at that time by Grotius and Sheldon.³ Efforts to define sea law this century began with a League of Nations conference held in The Hague in 1930. The Hague Conference of Parties marked the first truly international effort to codify an oceans policy regime in what Vallega terms the evolution of the sea use structure.⁴ At the Hague conference, a number of participating nations favoured designating the strip of water adjacent to coastal States as their territorial seas.⁵ No agreement was forthcoming in 1930, though, after which further efforts were stalled during the intervening war years.⁶ Custom therefore remained the dominant approach to international sea law, until this was finally supplanted by treaty in 1958.

Attention turned again to ocean policy affairs immediately following the conclusion of hostilities. A number of reasons can be proposed to account for this renewed global interest in the oceans. These include:

- the concept of an exploitable continental shelf becoming increasingly attractive to nations;

³ W. Ball, "The Old Grey Mare, National Enclosure of the Oceans" (1996) 27 *Ocean Development and International Law* 97-124; R. Friedheim, "Managing the Second Phase of Enclosure" (1992) 17 *Ocean and Coastal Management* 217-236; J. Green, "Antarctic EEZ Baselines: An Alternative Formula" (1996) 11 *International Journal of Marine and Coastal Law* 333-350; T. Mensah, "Background to the Law of the Sea Convention - Keynote Address", in M. Tsamenyi, S. Bateman and J. Delaney (ed), *Wollongong Papers on Maritime Policy No. 3 The United Nations Convention on the Law of the Sea: What it means to Australia and Australia's Marine Industries* (Centre for Maritime Policy, University of Wollongong, Wollongong, 1996) pp 9-16.

⁴ A. Vallega, *Sea Management - A Theoretical Approach* (Elsevier Applied Science, London, 1992).

⁵ A. Morgan, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action" (1996) 27 *Ocean Development and International Law* 5-29.

⁶ P. Bailey, "Australia and the Geneva Conventions on the Law of the Sea", in D. O'Connell (ed), *International Law in Australia* (The Law Book Company, Sydney, 1966) pp 228-245.

- growing interest in the offshore due perhaps to the heavy reliance upon terrestrial and littoral resources which occurred during the war;
- the development of technological capacities to exploit resources further offshore; and
- international willingness to contemplate new world orders and enter into international treaties, flowing from the cessation of hostilities.⁷

The year 1945 is accepted as a watershed year in the evolution of oceans policy. That year, motivated by the importance of marine resources—especially oil—President Truman proclaimed United States jurisdiction over the continental shelf.⁸ The U.S. proclamation importantly distinguished between the continental shelf and the superjacent waters; the latter displayed the character of high seas and therefore were open to free and unimpeded innocent passage.⁹ Notwithstanding that the United States claim explicitly preserved navigational freedoms, it nonetheless catalyzed other States to establish maritime zones adjacent to their shores.¹⁰

In his exhaustive treatment of the Law of the Sea, Attard documents the unilateral and regional claims made by coastal States during the 1950s.¹¹ These offshore claims were at times extensive and ambitious—particularly in relation to Latin America—far exceeding the U.S. claim and being indefensible on the grounds of maritime custom. The disorder that ensued offshore lent considerable urgency to the need for an international remedy to

⁷ Cullen, *op cit* fn 2 pp 13, 19-20; P. Reid, "Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone of Millstone?" (1980) 2 *Australian Mining and Petroleum Law Journal* 58-76.

⁸ "Natural Resources of the Subsoil and Sea-bed of the Continental Shelf" Presidential Proclamation 2667, 28 September 1945, 10 *Federal Register* 12303 (1945).

⁹ D. Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, Oxford, London, 1987); W. Ball, "The Old Grey Mare, National Enclosure of the Oceans" (1996) 27 *Ocean Development and International Law* 97-124.

¹⁰ R. Kenchington, *Managing Marine Environments* (Taylor & Francis, New York, 1990); A. L. Morgan, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action" (1996) 27 *Ocean Development and International Law* 5-29.

¹¹ Attard, *op cit* fn 9.

be reached. Knecht articulates this rapid deterioration in customary maritime law –

“This move by the United States represented a fundamental change in the ocean jurisdictional situation and it triggered similar action by a number of other nations over the next two decades. Nations without continental shelves invented other pretexts to support extension of their jurisdiction ... Latin American nations in particular found support in the U.S. move for their earlier notions of “patrimonial seas” and were quick to proclaim their own 200-mile zones, capturing valuable offshore tuna resources in the process.”¹²

European nations similarly made offshore claims during the 1950s. The extent of European offshore claims were modest compared with those in Latin America, though, being limited by several factors, such as the longer maritime tradition of Europe, a greater sense of custom, and the obvious potential for overlapping claimant boundaries.¹³ Australia’s continental shelf claims were more modest still, although for different reasons as discussed later.

During the 1950s there was therefore a panoply of jurisdictional assertions arising from many quarters of the international coastal community, with little consistency or basis to the form and content of these claims. It was this effectively lawless behaviour, and the uncertainty it created for navigation and resource use, that motivated the international community to respond to a problem that would only worsen. The response took the form of a settlement among all nations based upon convention; that is, a code resting upon treaty rather than custom.¹⁴ Four treaties addressing most areas of ocean policy were concluded in 1958 at the United Nations Conference on the Law

¹² R. Knecht, “The Exclusive Economic Zone: A New Opportunity in Federal-State Ocean Relations”, in Silva, M. (ed.), *Ocean Resources and U.S. Intergovernmental Relations in the 1980s* (Westview Press, Boulder, CO, 1986), 263-273, pp 264-5.

¹³ Attard, op cit fn 9.

¹⁴ Bailey, op cit fn 6.

of the Sea (UNCLOS I) held in Geneva, two of which are relevant to the thesis and are introduced here.¹⁵

The Convention on the Territorial Sea and Contiguous Zone was the most controversial of the UNCLOS treaties.¹⁶ Essentially, the territorial sea treaty was a collision between the traditions associated with high seas freedoms and the interests of coastal States in securing controls over the maritime approaches to their coastlines.¹⁷ At the Geneva conference agreement was reached on a number of territorial sea matters, such as: the drawing of baselines from which the territorial sea was to be measured;¹⁸ the width of lines enclosing bays as internal waters;¹⁹ rules applying to innocent passage;²⁰ and controls over immigration, customs and sanitation.²¹ What couldn't be settled in 1958, however, was the question of the width of the territorial sea, due to a combination of economic, political and also emotional reasons reported by Wilder.²² The many newly independent nations advocated codifying a twelve mile territorial sea, a view in which they were opposed by the maritime powers of France, Britain and the U.S.²³ In the event, because participants were unable to reach agreement over the

¹⁵ Unlike some of the unilateral claims of the Latin American States of the pre-conference period, UNCLOS was careful to treat separately living and non-living resources. Two of the four conventions - High Seas (450 UNTS p. 82) and Fishing and Conservation of the Living Resources of the High Seas (559 UNTS p. 285) - are of little relevance to jurisdictional developments as these pertain to the continental shelf, but should be mentioned very briefly for completeness. The Convention on the High Seas largely codified existing notions of freedom of passage, while the Fisheries Convention ventured further by recognizing the special interests of coastal States in preserving fish stocks. In the event, though, the latter convention failed to lead to rational claims of jurisdiction (see, generally, Attard *op cit* fn 9).

¹⁶ Bailey, *op cit* fn 6.

¹⁷ Convention on the Territorial Sea and the Contiguous Zone (516 UNTS p 205) [CTSCZ].

¹⁸ CTSCZ.Article 4.

¹⁹ CTSCZ.Articles 5, 7.

²⁰ CTSCZ.Articles 14-23.

²¹ CTSCZ.Article 24.

²² R. Wilder, "The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism" (1992) 32 *Virginia Journal of International Law* 681-746.

²³ Bailey, *op cit* fn 6.

territorial sea width this became the subject of a second UNCLOS meeting two years later, which again failed to settle the issue.²⁴

Of greater relevance to offshore petroleum development was the Convention on the Continental Shelf. This convention established a regime for defining the continental shelf and exploiting the resources situated thereon.²⁵ The convention defines natural resources of the continental shelf as comprising the non-living seabed resources of the seabed and subsoil, and also sedentary living organisms (because policy towards the latter help to demonstrate the Commonwealth's approach to offshore petroleum policy they are dealt with further in the following section).²⁶ The continental shelf is defined in the first of the Convention's fifteen articles as the submarine area adjacent to the coast seaward of the territorial sea. A crude formula was used to delimit the area to a depth of 200 metres, or beyond that "where the depth of the superjacent waters admit of the exploitation of the natural resources."²⁷ Within this zone, sovereign rights to exploit natural resources accrue exclusively to the coastal State, regardless of either occupancy or expressions to this end.²⁸ With respect to the former, the principle of sovereign rights was embodied in the convention in preference to the more encompassing sovereignty, because of the implied threats to high seas freedoms that this concept suggests.²⁹ Because these rights were based upon adjacency the accrual thereof to coastal States did not depend upon any affirmative actions on their part.³⁰

²⁴ Attard, *op cit* fn 9; I. Shearer, "International Legal Aspects of Australia's Maritime Environment", in *Australia's Maritime Horizons in the 1980s* (Occasional Papers in Maritime Affairs: 1, 1982) pp 1-8.

²⁵ Convention on the Continental Shelf (499 UNTS p 311) [CCS].

²⁶ CCS Article 2(4).

²⁷ CCS Article 1.

²⁸ CCS Articles 2(1), 2(2).

²⁹ R. Lumb, *The Law of the Sea and Australian Off-Shore Areas* (University of Queensland Press, St Lucia, Queensland, 1966).

³⁰ *Ibid.*

Unlike the territorial sea convention, the regime with respect to the continental shelf evolved rapidly from customary to treaty law, being agreed upon with rather little difficulty and controversy due to several factors. Firstly, there was great urgency in putting beyond doubt individual competing claims over continental shelves and the resources located thereupon.³¹ A second influence was the absence of a lengthy custom as existed in the case of the territorial sea, an intensely used stretch of coastline, which attached intimately to coastal nations.³² The liberal definition of the continental shelf is also likely to have facilitated agreement upon the convention.

As shown by the distance component of the continental shelf definition mentioned above, States' offshore jurisdiction would clearly creep further outwards as the development of technology so permitted. This definition was not intended to be ambulatory, however.³³ Rather, it was designed to compensate those coastal States possessing only narrow shelf areas. The criterion of exploitability was tempered by the 200 metre boundary, without which the notion of the continental shelf became detached from its very geographical basis.³⁴ Although it was recognized that technology would soon lead to abuse of the distance criterion,³⁵ the pace and scale of technological advancements for exploiting seabed resources was not anticipated at the time of drafting.³⁶ In the absence of another internationally acceptable solution, the exploitability criterion—with its de facto permission to extend jurisdiction further offshore—was adopted by claimant States as a mechanism by which to secure control over continental shelf resources.³⁷

³¹ R. Lumb, "The Continental Shelf" (1968) 6 *Melbourne University Law Review* 357-369.

³² Cullen, op cit fn 2 pp 19-20.

³³ Attard, op cit fn 9.

³⁴ D. O'Connell, "Problems of Australian Coastal Jurisdiction" (1968) 42 *The Australian Law Journal* 39-51.

³⁵ Lumb, op cit fn 29.

³⁶ O'Connell, op cit fn 34.

³⁷ R. Lumb, "Sovereignty and Jurisdiction Over Australian Coastal Waters" (1969) 43 *The*

As is described in detail following, the Commonwealth was very slow to take advantage of the UNCLOS Conventions to assist in its pursuit of domestic offshore policy. Australia's belated adoption of the treaties relied upon the ambulatory interpretation of the continental shelf, though, unlike the approach of other coastal States.³⁸ When UNCLOS III negotiations began in 1973, Australia argued strongly to retain the definition of the continental shelf agreed upon in 1958 because of the benefits to be gained by extending jurisdiction further offshore as technology permitted. Under the newer definition of the continental shelf, extended jurisdictional assertions incur an additional royalty cost which the Commonwealth sought to avoid until it could no longer resist moving to the updated regime [more later].

As can be seen, notions of freedom of the seas prevailed largely intact in the new conception of ocean order that emerged from UNCLOS.³⁹ The continental shelf convention did represent a significant enclosure of submerged lands, though, especially given its lack of a customary basis as existed in the case of the territorial sea. Bailey opined that the rules emerging from the conventions had been developed by and for the benefit of the traditional maritime powers, but they still served the interests of nations recently acquiring nationhood or independence, such as Latin America.⁴⁰ He considered that the conventions signed in 1958 embodied an "impressive consensus" of what twentieth century international sea law ought to be.⁴¹ Lumb concurs in this view, commenting that UNCLOS I "...constitute(d) an

Australian Law Journal 421-438.

³⁸ M. Landale and H. Burmester, "Australia and the Law of the Sea - Offshore Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 390-416.

³⁹ J. Schneider, "Something Old, Something New: Some thoughts on Grotius and the Marine Environment" (1977) 18 *Virginia Journal of International Law* 146-164.

⁴⁰ Bailey, op cit fn 6.

⁴¹ Ibid.

affirmative recognition by a substantial section of the international community of the legal regime of the sea-bed".⁴²

2.1.2 The Commonwealth and fisheries policy

In spite of their wide acceptance, the conventions did not give rise to any policy development in Australia, nor lead to the enactment of legislation. Indeed, it was only in settling outstanding problems of federal and state jurisdiction many years after their entry into force that the conventions were finally invoked in Australia [as discussed in Chapter Three later]. Partly, this is understood by reference to Australia's general support of freedom of the seas. As a nation heavily dependent upon shipping the country's interests were best served by a territorial sea of minimal width.⁴³ More generally, though, as shown throughout this thesis the Commonwealth has failed to act assertively with respect to jurisdiction over the continental shelf, and has for a confluence of reasons left much policy and administration of the petroleum regime to the discretion of the states. This failure to convert the treaties into a domestic regime reflects the Commonwealth's inertia in adopting international maritime regimes nationally through legislation—for reasons of law and policy, as will be introduced later—and its delay in availing itself of the benefits provided thereby.⁴⁴

The first plunge by the Commonwealth into marine resources policy epitomizes these policy-making shortcomings. Despite being in possession of the fisheries head of power as introduced in Chapter One, the Commonwealth displayed few desires to manage marine resources, and was content to leave policy and administration to the states.⁴⁵ State governments

⁴² Lumb, *op cit* fn 29, p 4.

⁴³ A. Bergin, "Australia and UNCLOS III" (1983) 29 *Australian Journal of Political History* 427-439.

⁴⁴ A. Bergin, "Australia Adopts New Maritime Zones" (1992) 7 *International Journal of Estuarine and Coastal Law* 123-128.

⁴⁵ A. Harrison, "Marine Living Resources Policy in Tasmania", in R. Herr, R. Hall and B. Davies (ed), *Issues in Australia's Marine and Antarctic Policies* (University of Tasmania,

were also reluctant to accept any management by the Commonwealth of marine resources.⁴⁶ It was only in the early 1950s that the Commonwealth entered the marine policy field by enacting two fisheries statutes and asserting limited sovereignty over the continental shelf. These Commonwealth enactments—the *Fisheries and Pearl Fisheries Acts* 1952 (Cth)—formally established in law for the first time the concept of Australian waters. More important than this legal recognition is the fact that neither statute was designed to displace state governments as fisheries managers. The two fisheries acts were intended explicitly to exert authority only "in the international sense."⁴⁷

The second reading speech for the *Fisheries Act* 1952 (Cth) observed that a need "had been felt for some considerable time" for Commonwealth law to regulate and control fisheries in waters beyond Australian territorial limits.⁴⁸ In this respect, Haward observes that the proposal to develop fisheries legislation was first raised in 1947, but that several more years were to elapse before progress was made due to delays between governments in reaching agreement as to their respective roles.⁴⁹ The main imperative for the Commonwealth to enter into fisheries policy was to provide the legislative capacity to regulate incidents relating to lawlessness, overfishing and piracy occurring in adjacent Victorian and New South Wales waters beyond three miles.⁵⁰ A similar tale is told with respect to pearl fishing, except that the area involved was to the north of Australia and the perpetrators were Japanese

Tasmania, 1982) pp 69-88.

⁴⁶ R. Herr and B. Davis, "The Impact of UNCLOS 3 on Australian Federalism" (1986) 41 *International Journal* 674-693.

⁴⁷ Harrison, *op cit* fn 45.

⁴⁸ *Hansard*, House of Representatives, 28 February 1952, p 564. It was noted that the development of federal legislation had begun in 1947 when the Commonwealth and states outlined an agreement to this end; the proposed legislation was delayed, however, due to what Harrison referred to as matters "unrelated to fisheries".

⁴⁹ M. Haward, *Federalism and the Australian Offshore Constitutional Settlement* (University of Tasmania, PhD thesis, 1992) pp 86-92; Harrison, *op cit* fn 45.

⁵⁰ *Hansard*, Senate, 5 March 1952, p 802.

fishers, activity which lead to enactment of the companion pearl fishing legislation (discussed below).⁵¹

At this time, it was assumed by many in Parliament that three miles was the distance at which state jurisdiction ended, based upon s 51(x) of the Constitution.⁵² Seaward of this distance states were assumed to be powerless to regulate and control fishing activity. The ambit of the fisheries power is unclear, however. The wording of the placticum seems to be an attempt to retain pre-federation arrangements regarding fisheries by fusing colonies' desires to control adjacent resources with the need to minimize jurisdictional conflicts.⁵³ Neither the inner nor outer geographical scope of the power can be clarified from the Constitutional Convention, but the policy behind the fisheries power seems to be a compromise to enable states to control fisheries to a distance three miles offshore.⁵⁴

The Constitutional Convention also gave relatively little guidance as to the concurrency or exclusivity of powers over fishing. One argument is that until the Commonwealth exercised its legislative power the regulation of fisheries would remain with the states.⁵⁵ Another possible limitation presented by section 51(x) was the legislative incompetence of the colonies with respect to matters located outside their territory. There are implicit in the fisheries power limitations on the competence of states to legislate extra-territorially –

⁵¹ *Hansard*, House of Representatives, 28 February 1952, p 565.

⁵² "The territorial limits, broadly speaking, define the jurisdiction of the States, and beyond those limits, and only beyond those limits, the Parliament of the Commonwealth may pass laws and make regulations on the subject of fisheries." *Hansard*, House of Representatives, 5 March 1952, p 873.

⁵³ Haward, *op cit* fn 49, pp 86-90.

⁵⁴ J. Waugh, *Australian Fisheries Law* (Intergovernmental Relations in Victoria Program, The University of Melbourne, Melbourne, 1988). During the drafting of the Constitution there was debate as to whether the Commonwealth even needed any legislative power in this field. On balance it seemed preferable for some such power to be transferred.

⁵⁵ D. Rothwell and M. Haward, "Federal and International Perspectives on Australia's Maritime Claims" (1996) 20 *Marine Policy* 29-46.

It does not automatically follow, however, that the States have exclusive legislative competence over fisheries within a three mile territorial sea ... there is a need to prove a nexus or connection between the State and the offshore activity that is the subject of legislation. The position remains that, in the case of the States, any legislative competence they may have over matters occurring in offshore waters is limited by their legislative incompetence.⁵⁶

The incompetence of states to legislate with respect to the offshore appears to therefore erode where there exists a sufficient nexus between the state and offshore areas. By enacting these Commonwealth statutes to first impose limitations upon Australian fishers, it was proposed to then extrapolate upon foreigners these same statutory provisions, thereby closing a gap in fisheries management.⁵⁷ The Commonwealth legislation was therefore purposed to create a framework for fisheries management throughout Australian waters by supplementing existing state regimes. Most importantly, this was achieved by vesting in states the federal authority to manage fisheries beyond three miles.⁵⁸

Question as to the outer limit of Australian waters was raised in Parliament, but the Commonwealth was keen not pursue this issue.⁵⁹ It was also suggested that the Commonwealth had no authority to delegate its power to the states.⁶⁰ These queries were ignored, with the second reading speech emphasising that state jurisdiction would be preserved and projected further offshore with the authority of Commonwealth law –

I should like to make it quite clear that the Government has no thought of encroaching in any way upon the sovereign rights of the States in their own waters. In the implementation of a total pattern of fisheries practice and conservation, the Commonwealth legislation makes provision under which the administration of the laws, both State and Commonwealth, in the waters contiguous to the States, could be

⁵⁶ *Ibid*, p 33.

⁵⁷ *Hansard*, House of Representatives, 28 February 1952, p 875.

⁵⁸ *Fisheries Act* 1952 (Cth) s 7; *Pearl Fisheries Act* 1952 (Cth) s 8.

⁵⁹ *Hansard*, House of Representatives, 5 March 1952, p 873.

⁶⁰ *Hansard*, Senate, 5 March 1952, p 841.

supervised by State officials, to the degree necessary, under power delegated by the Commonwealth.⁶¹

The public record suggests that a convergence of factors encouraged the Commonwealth to delegate fisheries policy and administration to the states. Firstly, state fisheries agencies had the experience and capacity to extend further offshore the same functions they performed within three miles of the coastline. It was logical to employ this expertise throughout the expanse of Australian waters rather than restrict it to the narrow coastal strip of territorial waters.⁶² Davis also notes that despite the rationale for the Commonwealth enacting fisheries legislation, the states still viewed the *Fisheries Act 1952 (Cth)* as an intrusion into a policy field they had hitherto considered their own.⁶³ Another factor influencing the approach was that the littoral extents of territorial waters and offshore jurisdiction were poorly defined in the Constitution and in practice, as introduced earlier. One of the attractions to the Commonwealth in delegating to the states federal authority was to avoid confronting the question of offshore jurisdiction.⁶⁴ That is, by adopting the approach proposed within the bills not only was a gap in regulation and control over Australian fisheries filled and administrative duplication avoided, but so too was "the difficulty of determining the lines of demarcation between state and Commonwealth authorities."⁶⁵ Notwithstanding the desires of all governments to implement this policy, a full three years were to pass before the *Fisheries Act 1952 (Cth)* was

⁶¹ *Hansard*, House of Representatives [John McEwan, Minister for Commerce and Agriculture], 28 February 1952, pp 564-565.

⁶² Senate Standing Committee on Trade and Commerce, *Development of the Australian Fishing Industry* (Australian Government Publishing Service, Canberra, 1982).

⁶³ B. Davis, "National Responses to UNCED Outcomes: Australia", in L. Kriwoken, M. Haward, D. VanderZwaag and B. Davis (ed), *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International, London, 1996) pp 25-40.

⁶⁴ Although ignored at the time, the question of the Commonwealth delegating its own powers to the states was to be raised in relation to a number of later developments, as will be seen in subsequent chapters.

⁶⁵ *Hansard*, Senate, 5 March 1952, p 840.

proclaimed, due to persistent difficulties in emplacing the necessary arrangements.⁶⁶ Clearly, the fisheries regime emplaced by the Commonwealth was shaped by its own inexperience and historic absence from the policy field, and the consequential occupation of this space by the states, which had become entrenched since federation.

2.1.3 Pearl Fisheries Act (No 2) 1953 (Cth)

As part of this fisheries package, an Australian continental shelf was created for the ostensible purpose of further regulating and controlling the northern pearl fishery, which was exploited by Japanese fishers. To this end, the Governor-General in 1953 proclaimed sovereign rights over the continental shelf adjacent to Australia for the purposes of exploring and exploiting the natural resources thereof.⁶⁷ As with the earlier U.S. proclamation, these sovereign rights were expressed not to affect the high seas status of the superjacent waters. The Australian proclamation did differ slightly in that it stated these sovereign rights to be recognized within the corpus of international law, coming eight years after Truman's assertion. The preamble to the Proclamation reads –

Whereas International Law recognizes that there appertain to a coastal state or territory sovereign rights over the seabed and subsoil of the continental shelf contiguous to its coasts for the purposes of exploring and exploiting the natural resources of that sea-bed and subsoil:

Cullen observes that “This proclamation was drafted in conformity with the provisional formulation of what was to become the 1958 Convention on the Continental Shelf.”⁶⁸ As discussed further below, Australia ensured that its offshore claim was consonant with that being proposed internationally so as to put it beyond reproach in this respect. Immediately following this executive action, legislation affirming and reinforcing the content of the

⁶⁶ Haward, *op cit* fn 49 pp 84-86.

⁶⁷ Commonwealth of Australia *Gazette* No 56, 11 September 1953.

⁶⁸ Cullen, *op cit* fn 2 p 19 [fn 33].

proclamations was enacted. The *Pearl Fisheries Act (No 2) 1953 (Cth)* amended the original act of the same name by establishing a statutory continental shelf, and extending Australian jurisdiction in respect thereof to foreign fishers.⁶⁹

The effect of these actions was to place sedentary fishing firmly under Australian jurisdiction.⁷⁰ However, the nature of Australia's claim over the continental shelf invites closer inspection for what this suggests about Commonwealth policy towards the offshore. Firstly, it is quite apparent that the federal government was prepared to assert jurisdiction over the continental shelf—and adjacent high seas fishing—with reservation. Australia acted authoritatively in an international sense, without challenging legal relationships of a domestic nature and only once discussion over the offshore had been opened by the claims of other nations. That is, despite being able to lay claim to a vast offshore area, the Commonwealth awaited moves by the international coastal community before itself moving in this direction. Even then, Commonwealth action was only a response to poaching by Japanese fishers and the legislative vacuum existing beyond three miles, rather than being a more assertive application of Commonwealth jurisdiction.⁷¹ Over time, this approach to policy has come to define federal marine policy, a position from which the Commonwealth has struggled to recover.

Debate on the amendments creating the continental shelf reveals the frustration of many members, who were keen to see the bill strengthened. Rather than declare the continental shelf appertaining to Australia to fall

⁶⁹ *Pearl Fisheries Act (No 2) 1953 (Cth)* s 4.

⁷⁰ L. Goldie, "Australia's Continental Shelf: Legislation and Proclamations" (1954) 3 *International and Comparative Law Quarterly* 535-575.

⁷¹ *Hansard*, Senate, 5 March 1952, p 839; House of Representatives, 10 September 1953, pp 116-120, 122-129; Senate, 17 September 1953, pp 100, 103.

under Australian jurisdiction in entirety, the "safer approach"⁷² was to vest in the Governor-General the power to proclaim areas selectively up to a depth of 100 fathoms.⁷³ From the ensuing debate it transpired that the government's failure to proclaim any Australian waters since the 1952 fisheries acts were enacted eighteen months previously cast doubt upon the ability of the proposed legislation to protect Australia's marine resources.⁷⁴

Put in the context of the growth in international maritime law permitting a more definitive Commonwealth offshore claim to be made, the Leader of the Opposition, Gough Whitlam, urged that federal powers be more expressly and clearly stated than in the "humiliating" bill presented to Parliament.

This bill is the third attempt on the part of the Government in eighteen months to deal with this situation. Let us make the bill strong so that the Government will be able to exercise the power that it requires. This Parliament possesses great constitutional power in matters of this kind. Let us make the legislative power of the Parliament correlative with the constitutional power.⁷⁵

In the minds of many legislators there was no doubt as to the Constitutional powers available to the Commonwealth to act assertively. Quite clearly, though, the government was pained not to offend international law,⁷⁶ and advanced the pearl fisheries bill on the basis that it reconciled this emerging area of law with the constitutional position.⁷⁷ In this regard, the legislation was framed to better express the provisions available in international law than it was a reflection of the Commonwealth's Constitutional capacities.

⁷² *Hansard*, House of Representatives, 10 September 1953, pp 113-114, 121.

⁷³ *Pearl Fisheries (No 2) Act 1953* (Cth) s 3(5).

⁷⁴ *Hansard*, House of Representatives, 10 September 1953, p 140; Senate, 17 September 1953, p 102.

⁷⁵ *Hansard*, House of Representatives, 10 September 1953, p 117. Future Prime Minister Whitlam while in opposition was one of the most vitriolic critics of the Commonwealth's offshore policy during the 1950s and 1960s. Whitlam was to later initiate a massive redefining of the federal role when elected to power in the early 1970s, described in Chapter Three.

⁷⁶ *Hansard*, House of Representatives, 10 September 1953, pp 121, 130, 132; Senate, 17 September 1953, pp 58, 104.

⁷⁷ *Hansard*, House of Representatives, 10 September 1953, p 133.

One concern pertained to the particular form of domestic sovereignty proposed by the implementing bill. The method of jurisdictional assertion invoked over the continental shelf was annexary assumption, a form of claim which acknowledged that jurisdiction was being asserted in respect of areas where no jurisdiction had existed previously. During Senate debate on the bill it was suggested that the alternative form of jurisdiction—declaratory assertion—was preferable, containing as it did the proposition that the extant state of legal affairs had a historical basis and was not newly being construed.⁷⁸ Twenty years later, Commonwealth legislation enacted to challenge the arrangements reached during this earlier period was deliberately declaratory in nature, a tactic designed to provoke a challenge to its validity by the states.⁷⁹

Prior to enactment of the pearl fishing legislation in 1952, Australia had not excluded foreign fishers from exploiting its waters, nor itself had exerted claims. Because of these circumstances, O'Connell acknowledged that an alternative to declaratory assertion based upon longevity of use had to be found for claiming the continental shelf.⁸⁰ In the event, an annexary claim was made by marrying a statutory licensing system to notions of sovereign rights as being contemplated in preparation for the 1958 UNCLOS conference. Goldie commented that few problems of international law arose from this arrangement despite claims to the contrary by Japan.⁸¹

Notions of continental shelf natural resources were originally restricted to minerals, stemming from the Truman proclamations and the doubtless focus

⁷⁸ *Hansard*, Senate, 17 September 1953, p 105.

⁷⁹ The statute in question, the *Seas and Submerged Lands Act 1973* (Cth) was unusual by virtue of its declaratory nature; see, J. Waugh, *Australian Fisheries Law Intergovernmental Relations in Victoria Program*, The University of Melbourne, Melbourne, 1988).

⁸⁰ D. O'Connell, "Australian Coastal Jurisdiction", in D. O'Connell (ed), *International Law in Australia* (The Law Book Company, Sydney, 1966) pp 246-291.

⁸¹ Goldie, *op cit* fn 70.

thereof with petrolic resources.⁸² However, the verbaige and intention of those same proclamations permitted of a broad interpretation of natural resources, and it was by interpreting loosely the definition of resources that Australia lay claim to its continental shelf, primarily for regulating pearl fishing. Japan protested strongly at the *Pearl Fisheries Act (No 2) 1953 (Cth)* and the impositions it made in terms of access to the continental shelf. Bailey suggests that it was this protestation which lead the Commonwealth to embrace the wide definition of natural resources embodied in Convention on the Continental Shelf, and to work industriously in Geneva to see this definition adopted.⁸³ The Commonwealth, it seems, was keen not to offend international legal concepts by taking unilateral action in the pursuit of domestic policies.

Several points can be made about the Commonwealth's entry into the marine resources policy field in the early 1950s. Firstly, no attempt was made to establish comprehensive legislation at the time of the continental shelf proclamation,⁸⁴ despite the timeliness of linking fisheries developments with minerals policy. The petroleum potential of the continental shelf was broached by Whitlam during the passage through Parliament of the fisheries statutes⁸⁵ –

Recently, in the United States of America, various States wished to establish sovereignty over the continental shelf for the purpose of drilling for oil ...Is there any reason why we should seek to hide our desire to establish sovereignty over the continental shelf. If we wish to establish such sovereignty, we should make our intention clear in the definition of the continental shelf in this bill. In the event of oil being discovered in parts of the continental shelf, it is important that we now

⁸² *Hansard*, Senate, 17 September 1953, p 103.

⁸³ Bailey, *op cit* fn 6.

⁸⁴ R. Lumb, "Australian Coastal Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 370-389.

⁸⁵ *Hansard*, House of Representatives, 10 September 1953, p 124; *Hansard*, Senate, 17 September 1953, pp 103, 106.

make it clear that we are interested not only in pearl fisheries but also in establishing sovereignty over the continental shelf.⁸⁶

The Opposition lamented that the opportunity to articulate an Australian ocean policy was being wasted: "... no further time should be lost in ensuring that the policy of the Australian Government shall be [similarly] clear and firm."⁸⁷ In spite of Opposition lamentations, the Government for the reasons outlined previously pertaining to inexperience resisted this argument in its policy approach.

Following from this observation is the Commonwealth's lack of horizontal integration. Despite efforts at the time by the Commonwealth to secure a satisfactory continental shelf treaty, there was no attempt to consolidate this nationally through legislation. As will be seen in later chapters, the Commonwealth's approach to treaty implementation has matured considerably, and treaty provisions are now fully availed of in the support of domestic resource policies.

The third point to be made is that the Commonwealth was again willing to abdicate to the states regulatory control with respect to the newly formed regime. It is recalled that the fisheries regimes enacted the previous year were returned to the administrative capabilities of the states. By the time that the *Pearl Fisheries (No 2) Act 1953 (Cth)* was enacted this arrangement appears to have become so emplaced that the question as to which jurisdiction should administer the continental shelf regime was never even raised.

The Commonwealth, it seems, sought to avoid assuming a dominant position in the marine resources domain relative to the state governments, for reasons of policy, administration and capacity as much as legal uncertainty. This same admixture of influences explains petroleum

⁸⁶ *Hansard*, House of Representatives, 10 September 1953, p 111.

⁸⁷ *Hansard*, House of Representatives, 10 September 1953, p 140.

developments a decade or so later, although jurisdictional questions and militant state and industry interests assumed greater influence during 1960s regime developments. In 1958, though, relations between the Commonwealth and states were so cordial that the likelihood of jurisdictional questions being raised was attributable only to a third party litigant claiming the exclusivity of a particular sphere, rather than challenge as to jurisdiction over marine resources being brought by either sphere of government.⁸⁸ A more astute commentator noted that the arrangement would survive only until exploitable quantities of petroleum were discovered offshore.⁸⁹ In terms of the evolution of the petroleum regime, the absence of conflict during the 1950s had the effect of consolidating the role of states as marine resource managers, a situation from which the Commonwealth struggled to gain policy making and administrative capabilities a decade later.

2.2 JURISDICTION OVER OFFSHORE PETROLEUM IN AUSTRALIA

2.2.1 Background to jurisdictional questions

Following the brief legislative activity of the 1950s, the Commonwealth prior to the mid-1960s continued to display few desires to manage marine resources, an attitude which complemented the states' reluctance to allow Commonwealth involvement in offshore policy.⁹⁰ Intergovernmental rivalry over offshore resources was therefore avoided as a policy issue.⁹¹ Because of this lack of tension, the framework within which early petroleum development unfolded lacked any clarified jurisdictional or legislative basis. During the 1960s oil exploration began in earnest offshore Australia, and the

⁸⁸ O'Connell, op cit fn 80.

⁸⁹ E. Campbell, "Regulation of Australian Coastal Fisheries" (1960) 1 *Tasmanian University Law Review* 405-428.

⁹⁰ Herr and Davis, op cit fn 46.

⁹¹ O'Connell, op cit fn 80.

Commonwealth's interest in offshore resource—or rather, the lack thereof—was carried over into its initial contribution to offshore oil policy.⁹² The Commonwealth was clearly inexperienced in managing resources, and displayed little inclination to move in this direction.⁹³ Consequently, the Commonwealth's involvement occurred through the fiscal measures it had at its disposal. Investment in exploration technologies was critical for maintaining the health of the infant petroleum industry. By providing taxation concessions and financial incentives for explorers, the Commonwealth was able to foster a robust investment climate and to thereby influence the speed and direction of offshore development.⁹⁴

During this period of investor confidence, questions concerning jurisdiction and legislative competence—already neglected—remained forgotten. In the absence of clearly assigned jurisdictional powers, petroleum development was regulated by states under onshore mining legislation that purported to apply in respect of offshore areas.⁹⁵ Reid describes the situation thus –

In the early 1960s, the Australian States individually sought to legislate to control offshore exploration and production following the ratification by Australia of the two 1958 Geneva Conventions. For example, Queensland passed the Mineral Resources (Adjacent Submarine Areas) Act of 1964 which boldly asserted that minerals found on or in the seabed below or beyond the territorial sea were the property of the Crown in the right of the State and Queensland sought to regulate mining in offshore areas by applying onshore mining and petroleum legislation to these activities.⁹⁶

⁹² R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" (1988) 6 *Journal of Energy and Natural Resources Law* 213-247.

⁹³ Hansard, House of Representatives, 26 October 1967, p 2369.

⁹⁴ Cullen, *op cit* fn 2 p 71; J. Taylor, "The Settlement of Disputes Between Federal and State Governments Concerning Offshore Petroleum Resources: Accommodation or Adjudication?" (1970) 11 *Harvard International Law Journal* 358-399.

⁹⁵ A list of state statutes used in this manner is found in Cullen, *ibid*.

⁹⁶ Reid, *op cit* fn 7, p 59.

The constitutionality of this legislation was of doubtful legality, given the extra-territorial incapacity of the states as described in Chapter One, and the arrangement survived largely on governmental faith, a fact that was recognised in the federal parliament.⁹⁷ That the states should regulate offshore petroleum was the product of history, attitude and convenience. In terms of historic influences, as shown at length the states were already the major actors with respect to offshore resources policy through their management of fisheries, a situation that was now ingrained and difficult to reverse. Attitudinally, the Commonwealth was disinclined—or at best indifferent—about assuming a substantial role in petroleum policy or administration, and lacked the expertise in this regard.⁹⁸ The third point arises from the fact that the Commonwealth was not a significant land holder and did not have in place a parallel and easily adaptable system for allocating and disposing of resources. As noted in Parliament, it was therefore convenient that regulatory control should fall to the states.⁹⁹ For several years, then, offshore development took place in a framework without any certainty in terms of its jurisdictional basis.

The first hint of conflict over the role of the Commonwealth and the states in offshore policy corresponded to increasing interest in the exploitation of marine resources.¹⁰⁰ By the mid-1960s the investment in technology was paying off and an oil boom seemed likely. Offshore reserves were emerging as a resource of national importance, attracting a greater interest by the Commonwealth in petroleum development policy in place of its previous complacency towards the offshore.¹⁰¹ The Commonwealth

⁹⁷ *Hansard*, House of Representatives, 18 October 1967, p 1942.

⁹⁸ *Hansard*, House of Representatives, 26 October 1967, p 2397.

⁹⁹ *Hansard*, House of Representatives, 16 November 1965, p 2741.

¹⁰⁰ "The need to establish a legislative and administrative framework for offshore Australia intensified with increasing interest in offshore oil and gas exploitation." Rothwell and Haward, *op cit* fn 55 p 34.

¹⁰¹ B. Opekin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International*

became increasingly keen to participate in the award of titles directly rather than having to rely upon financial measures to support title-holders in oilfield exploration. The legal basis of offshore titles—the extension to offshore areas of onshore instruments—was at best shaky, and by exposing the foundation of these titles to review, considerable doubt was cast upon the legality of costly rights granted by state governments in respect of vast offshore tracts.¹⁰² In Haward's terms, statutory changes were struggling to keep pace with exploration activity,¹⁰³ leaving potential explorers in a position of considerable vulnerability. Governments were coming under "intense pressure" to put aside jurisdictional differences in order to negotiate a stable offshore petroleum regime, the two factors which are commonly held to account for the regime, the Australian Petroleum Settlement.¹⁰⁴ Although of doubtless influence in this respect, several variables identified earlier more fully explain the structure and provisions of the Settlement.

Before turning to examine the Australian Petroleum Settlement and analysing its development, it is useful to first review the opinions prevailing at the time as to the assignment of offshore jurisdiction in Australia. Enormous intellectual effort has been expended in constructing jurisdictional arguments which have attempted, with varying degrees of accuracy, to blend municipal with international law principles. Given the importance of international law for offshore jurisdictional issues, it is worth commenting briefly that the 1958 treaties were considered reliable as a law-making source for domestic purposes, based upon their customary and treaty nature. To the

Law 395-431.

¹⁰² *Hansard*, House of Representatives, 26 October 1967, p 2376.

¹⁰³ M. Haward, "The Australian Offshore Constitutional Settlement" (1989) 13 *Marine Policy* 334-348.

¹⁰⁴ M. Crommelin, "Federal-Regional Cooperation: A Comparative Perspective", in J. Saunders (ed), *Papers presented at the 2nd National Conference on Natural Resources Law, 1985 Managing Natural Resources in a Federal State* (Carswell, Calgary, Canada, 1986) p 295-321; R. Cullen, "Canada and Australia: A Federal Parting of the Ways" (1989) 18 *Federal Law Review* 68-83.

extent that the UNCLOS treaties were internationally consensual and not inconsistent with common or statute law, these could form the basis of legitimate Australian action. Without internal legal recognition, however, the precise effect of these conventions upon citizens, and the vesting of powers in the Crown, was considered doubtful.¹⁰⁵ However, it was the precise mechanism through which this recognition was to be given that caused considerable diversity in legal theories and arguments.

In the following sections, the viewpoints propounded during the 1960s are reviewed to recreate the legal circumstances within which the 1967 Settlement was reached. This review provides the basis for understanding the form and content of this original regime, and the analytical context for its subsequent evolution.

2.2.2 Territorial sea

There existed a greater consensus in 1967 insofar as the territorial sea was concerned than was the case with respect to the continental shelf. Authors widely subscribed to the view that the territorial sea fell under the jurisdiction of the states, although the arguments advanced in this regard did vary. Goldie's view was the simplest of all: he considered that jurisdiction within territorial waters was reserved to the states because section 51(x) of the Constitution mentioned above gave to the Commonwealth the express power to legislate with respect to fisheries beyond territorial limits.¹⁰⁶ In this regard, Goldie presumably considered that using s. 51(x) to support the *Pearl Fisheries Act 1952 (Cth)* created a nexus pursuant to which federal jurisdiction could be exerted more broadly than in relation to just fish.

¹⁰⁵ Lumb, op cit fn 29.

¹⁰⁶ Goldie, op cit fn 70.

A similar logic is employed by Campbell¹⁰⁷ who adopted the general Constitutional rule that all legislative powers not expressly conferred upon the Commonwealth Parliament reside with the states. The Constitution [s. 51(x)] is explicit with respect to Commonwealth power over fisheries only in waters beyond territorial limits, inside of which jurisdiction therefore rests with the states. Campbell does acknowledge the international dimension to territorial waters, but argued that the Commonwealth may act authoritatively in relation to territorial waters only as national sovereign, and not in matters of domestic legal concern. To assert property rights in the domestic sense would deprive the states of territory and violate section 123 of the Constitution pertaining to alterations to state boundaries.¹⁰⁸ Based upon this rationale, Campbell accepts implicitly that the legislative scheme in place for fisheries was applicable to submerged minerals located in the same territorial waters.

Other writers looked to alternative sources of Commonwealth law in relation to the offshore. According to Harders' analysis, the Commonwealth's Constitutional source with respect to territorial waters was s. 51(xxix), the external affairs power, pursuant to which the Convention on the Territorial Sea and Contiguous Zone was implemented in Australia.¹⁰⁹ In spite of his resoluteness on this point, Harder accepted that uncertainty arose as to which sphere of government the territorial sea actually appertained. Harders doubted that the act of acceding to an international treaty eclipsed pre-

¹⁰⁷ Campbell, *op cit* fn 89.

¹⁰⁸ Section 123 of the Constitution stipulates the formula for altering the boundaries of states - The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

This complex definition becomes important in relation to later developments, particularly the 1980 Offshore Continental Settlement.

¹⁰⁹ C. Harders, "Australia's Offshore Petroleum Legislation: A Survey of its Constitutional and its Federal Features" (1968) 6 *Melbourne University Law Review* 415-428.

colonial ties of the states to territorial waters, which he held had survived the act of federation. To this end, he considered the fisheries power was useful in interpreting the ambit of Commonwealth offshore jurisdiction. According to Harders, nothing in section 51(x) either excluded the operation of state fisheries legislation within the territorial sea, nor mining laws in areas beyond.

In a *tour-de-force* analysis of the interface between municipal and domestic law, Lumb termed the debate over territorial sea jurisdiction as an "irritating confusion" of the two legal positions.¹¹⁰ He was particularly concerned with answering whether sovereignty over territorial waters was converted to the Commonwealth upon federation. In his analysis, Lumb recounted the various juridicial opinions as set down in cases determined in other coastal nations, and reconciled these with the effect in Australia of the 1958 convention. His view held that the general capacity to legislate in respect of the seabed and superjacent waters was vested in state parliaments through the plenary power to make laws for the peace, welfare and good government of areas which were subject to state jurisdiction. This law-making capability included the enactment of legislation to develop offshore minerals lying beneath territorial waters.

Lumb's opinion is reinforced by the clear intention of Constitutional drafters that states were to retain control of fisheries within territorial waters. Given this intent, he argued that the fisheries legislation constituted a framework for interpreting the scheme in place for minerals, and that it was inconceivable that this same intent could not be extended to encompass non-fisheries resources. Indeed, this precise legal theory was in fact confirmed by the practice of states at the time of extending offshore their terrestrial mining regimes.

¹¹⁰ Lumb, *op cit* fn 29.

Lumb conceded that the Commonwealth's legislative capabilities had increased by ratifying the UNCLOS conventions. However, he found a supportive argument for his general position in the fact that despite the Commonwealth entering into an oil pollution treaty in 1954, this entry did not deprive states of their pre-existing ability to enact laws combatting oil pollution within territorial waters.¹¹¹ On balance, Lumb considered the proprietary rights of the state in the seabed had not been ousted: legislation enacted by the Commonwealth Parliament pursuant to external affairs and navigation powers could affect but not destroy the prerogative rights of the states to the seabed beneath territorial waters. In fact, Lumb held that one of the few functions exercisable by the Commonwealth with respect to the territorial sea was that of a purely international nature, namely, determining the outer limits of the territorial sea, a subject which eluded settlement at Geneva.

An exhaustive discussion by O'Connell developed even further the arguments advanced by Lumb, with whose view he concurred in commenting that the effect of international law upon federal-state claims was neither clear nor predictable.¹¹² O'Connell adopted a minimalist view by conceding that states could claim their colonial boundaries as existed at federation. To answer the question as to what were these boundaries, he posited that territorial waters were Crown land of the colonies, and they remained so after federation. In this respect he rejected as misconceived the doctrine of colonial extra-territorial incompetence, on the grounds that

¹¹¹ International Convention for the Prevention of Pollution of the Sea by Oil 1954 (OILPOL) was the first international effort to protect the seas from pollution. The relevant Commonwealth law—*Pollution of the Sea by Oil Act 1960* (Cth)—was expressed to apply outside of Australian territorial waters, which were covered by a battery of state statutes - *Prevention of Oil Pollution of Navigable Waters 1960* (NSW); *Navigable Waters (Oil Pollution) Act 1960* (Vic); *Pollution of Waters by Oil Act 1960* (Qld); *Pollution of Waters by Oil Act 1961* (SA); *Pollution of Waters by Oil Act 1960* (WA); *Oil Pollution Act 1961* (Tas). See: M. White, *Marine Pollution Laws of the Australasian Region* (Federation Press, Sydney, 1994).

¹¹² O'Connell, *op cit* fn 80.

legislatures of the colonies were exercising jurisdiction for the peace, order and good government thereof. Like Lumb, O'Connell looked to the original constitutional conventions and the intentions of the drafters to arrive at this opinion.

In forceful terms he then went on to dismiss the thesis which held that property rights offshore inhere to the federal government as an incident of federation, remarking that this would give a "novel" twist to the principles of federalism.

State Crown land cannot under any theory at present admitted in Australian constitutional law "slide" to the Commonwealth, and an Australian court would find great difficulty in deciding the question posed in this paper in any terms other than ownership, no matter how attractive it might be to approach the question from the point of view of the international competence of the Federal Government.¹¹³

O'Connell concluded that while the Commonwealth was not inhibited from discharging any of its obligations arising under international law the states clearly owned territorial waters.

Only one author seemed to raise any doubt insofar as jurisdiction over the territorial sea was concerned. Taylor¹¹⁴ cautioned that because states did not have a long historical association with offshore waters based upon usage they were in a weakened position relative to the situation as existed in the United States, where the states had actually been denied offshore jurisdiction. In this regard his comments concur with that presented earlier regarding Australia's proclamation and legislative assertion over the continental shelf, where it was suggested that an alternative to longevity of connection—or declaratory assumption—had to be found.

¹¹³ Ibid, p 260.

¹¹⁴ Taylor, op cit fn 94.

Taylor's comments, however, were clearly in a minority and less well developed than some of the other arguments surveyed. It is ironic that of all the opinions advanced this was the one which proved most juridically correct, although for reasons which differed from those finally determined in the case *New South Wales v the Commonwealth*, discussed in the next chapter. The prevailing opinion was nonetheless that state governments exercised jurisdiction over the territorial sea, subject only perhaps to Commonwealth actions of an international nature relating to the international character of the territorial sea.

2.2.3 Continental shelf

The situation with respect to the continental shelf was the subject of less discussion, attributable to the fact that writers generally agreed the Commonwealth was the appropriate authority exercising jurisdiction over this area.¹¹⁵ Lumb, for instance, concluded that the constitutional authority of the states did not uphold their legislative assertions over the continental shelf.¹¹⁶ He considered that while the Commonwealth's incidental power—section 51 (xxxix)—would have supported the enactment of federal legislation governing offshore development, the external affairs power provided a stronger basis for any such legislation.

O'Connell contemplated the nature of jurisdiction sourced in the continental shelf convention.¹¹⁷ In particular, he wondered whether the provisions for sovereign rights contained therein brought the continental shelf within the boundaries of signatory nations, or if this geographical area remained legally extra-territorial. That various state enactments attempted to forge a nexus between their legislative competence and the continental shelf seemed to acknowledge that the continental shelf was indeed extra-territorial,

¹¹⁵ See, generally: *Ibid*; Lumb, op cit fn 31.

¹¹⁶ Lumb, op cit fn 29.

¹¹⁷ O'Connell, op cit fn 34.

perhaps even to the Commonwealth. Assuming that the continental shelf was beyond state boundaries, laws purporting to create a valid state titles regime must therefore be expressed to operate extra-territorially, and could only do so as exceptions to the general rule of incompetence.

A limitation to the doctrine of state competency with respect to the continental shelf was raised by O'Connell. This is found in the fact that the states are incapable of dividing the continental shelf between themselves because this function belongs exclusively to the Commonwealth.¹¹⁸ If the continental shelf was outside of the Commonwealth's realms also, it follows that the only laws possibly applicable in this circumstance were those enacted validly for extra-territorial activities. As mentioned already, this law-making power is reserved to the Commonwealth pursuant to its international personage.¹¹⁹ Therefore, it was upon an evaluation of this shaky legal premise of extra-territorial competence that O'Connell determined jurisdiction over the continental shelf belonged to the Commonwealth.

Harders' analysis is worth mentioning for completeness because he departs slightly from the conventional wisdom.¹²⁰ Although concurring with the majority view that the Convention on the Continental Shelf was properly the Commonwealth's responsibility, Harders argues against adopting a narrow view of state legislative competence. He considers that the states could legislate to exercise the rights associated with the convention to ensure its discharge in Australian law, without detracting from Commonwealth exclusivity in the international sense. To so act would "put in better perspective the place occupied by the legal assertions" during this period.

¹¹⁸ The exclusivity of the Commonwealth to divide the continental shelf among the states is found in the fact that the continental shelf exists in an international context, where the Commonwealth only has sovereign personality.

¹¹⁹ Constitution of Australia, s 51(xxix).

¹²⁰ Harders, *op cit* fn 109.

It was in this climate that offshore jurisdiction was settled in 1967. Although there existed some confusion with respect to jurisdiction over the territorial sea, this was reduced in the case of the continental shelf which was widely held to accrue to the Commonwealth. This accrual was based upon the argument that an insufficient nexus or connection existed between the states and the continental shelf, as amplified by the existence of the 1958 convention entered into by the Commonwealth.

Despite the preoccupation with legal arguments during the formative period of the Australian Petroleum Settlement, the resolution of jurisdictional questions was reached on terms surprisingly close to those proposed above by Harders. He suggested that legislative implementation of the continental shelf convention could be effected by the states without offending the Commonwealth's international responsibilities. In other words, the strictly legal aspects of the Settlement were superseded by the political attractiveness of a particular option, an outcome which is understandable when considered in light of the minor offshore role in resources policy filled by the Commonwealth in the 1950s and 1960s. That is, although most commentaries were preoccupied with arcane jurisdictional problems, the outcome was less a reflection of legal uncertainties than it was a range of other influences.

2.3 AUSTRALIAN PETROLEUM SETTLEMENT

2.3.1 The 1967 Settlement

Political negotiations to settle the legal problem of offshore jurisdiction began during the mid-1960s. Essentially, these negotiations were concerned to secure the validity of offshore titles without resorting to litigation, nor by challenging the jurisdictional bases of titles.¹²¹ This security was achieved by

¹²¹ *Hansard*, House of Representatives, 18 October 1967, p 1943; Senate, 6 November 1967, p 2187.

establishing a joint legislative scheme sourced in complementary state and Commonwealth statutes, ensuring that titles would be valid regardless of any eventual juridicial outcome. All governments were in agreement as to the broad scheme, but three years of negotiations passed between the announcement of this national solution and enactment of the enabling legislation.¹²² The 1967 Australian Petroleum Settlement was the product of these protracted negotiations.

Haward details the series of meetings held during the 1960s between the Commonwealth and the states, and shows the emphasis in these fora that was given to providing certainty and avoiding litigation.¹²³ The states also strongly opposed the original proposed revenue sharing arrangements. Over the course of negotiations the states obtained the Commonwealth's agreement that they should receive a majority of revenue from offshore production.¹²⁴ This outcome reflected the political view of the time that the states were the dominant administrators of the offshore petroleum regime, and were accordingly entitled to a greater share of royalties than was the Commonwealth. The view of offshore arrangements held by politicians was not shared by senior officials at the bureaucratic level, who resented the superior minerals expertise of the Victorian counterparts.¹²⁵

The oil industry was fully supportive of the Settlement, satisfying as it did their demands for security of title. The chair of ESSO remarked –

We may therefore conclude first, that for the foreseeable future the relevant questions of sovereignty have been sufficiently resolved to

¹²² Crommelin, op cit fn 86; A. Dakin, "Future Patterns of Legislation for the Petroleum Industry" (1968) 6 *Melbourne University Law Review* 403-414; Harders, op cit fn 109.

¹²³ Haward, op cit fn 49 pp 99-119.

¹²⁴ Rothwell and Haward, op cit fn 55. Compare Parliamentary statement of 16 November 1965 p 2741 with the second reading speech of the *Petroleum (Submerged Lands) Bill* 1967 (Cth) two years later. In the earlier speech, royalties were to be distributed evenly between the federal and state governments; the final agreed upon ratio was 60:40 in the states' favour.

¹²⁵ G. Stevenson, *Mineral Resources and Australian Federalism* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1976).

assure the petroleum industry of the security of the exploration and petroleum rights granted under existing permits and licences ...possible Federal-State jurisdictional conflicts have been averted sufficiently to avoid awkward complications in government-industry relations ... I personally feel that the benefits to the nations as a whole of a developing Australian petroleum industry will be achieved at a much earlier date by the legislation now in force than if the whole gamut of litigation, friendly or foe, had been allowed to follow its endless course.¹²⁶

The Settlement was clearly a political and not a legal solution to a problem of constitutional law. Because of this fact, the legislation could only reduce uncertainty over offshore jurisdiction rather than achieve the removal thereof. In 1967, Australia looked to the United States and learned from its legalistic approach to offshore development. Legislators were unmistakably of the view that the litigious experience of the U.S. should be avoided in Australia.¹²⁷ A political solution under which no litigation could occur was embraced by all governments as an alternative model.

The intention and administrative scheme of the Settlement is amply illustrated in the second reading speech of the bill giving effect to the new offshore petroleum regime –

In Australia the governments of the Commonwealth and the States believe that they have overcome these problems without recourse to litigation between governments. To achieve this result they have mutually agreed that without abating any of their constitutional claims—that without abandoning these claims—and that without derogating from their respective constitutional powers, they would enact legislation providing for a common mining code to apply uniformly throughout offshore areas including both the territorial sea and the outer continental shelf.¹²⁸

The Settlement consisted of two-parts, a political Agreement and complementary legislation. The Agreement, a twenty-six clause document,

¹²⁶ J. Hamlin, "Comment on Lumb" (1969) 43 *Australian Law Journal* 444-447, p 446.

¹²⁷ *Hansard*, House of Representatives, 18 October 1967, pp 1102-3.

¹²⁸ *Hansard*, House of Representatives [David Fairbairn, Minister for National Development], 18 October 1967, p 1943.

detailed the objectives and broad principles of a common code for offshore petroleum development agreed to by the state and federal governments.¹²⁹ The provisions of the Agreement were couched in hortatory language, committing all governments to consensus decision making. Legally-binding provisions were eschewed by the Commonwealth and the states in their efforts to avoid the potential for litigation.¹³⁰

Supporting the Agreement and the cooperative framework it envisaged were Commonwealth and state statutes, the second part of the Settlement. The *Petroleum (Submerged Lands) Acts* were needed to create the essential statutory titles to explore and produce offshore. This legislation was identical in title and provision except that the Commonwealth *Petroleum (Submerged Lands) Act* 1967 applied to waters right around the country, whereas the state acts applied to those offshore waters adjacent to each state. The scheme emplaced was therefore distinctive in two respects: Australian waters from low water mark to the continental margin were covered by overlapping Commonwealth and state statutes; and the legislation did not distinguish between the two offshore zones (territorial sea and continental shelf).¹³¹ Although reference to the Convention on the Continental Shelf was made in the preambles to the statutes—which were couched in terms consistent therewith—the *Petroleum (Submerged Lands) Acts* did not purport to give effect to the convention. As will be seen, though, it was by legislating to explicitly give effect to the conventions that the Commonwealth was able to intervene further in marine policy during the early 1970s.¹³²

¹²⁹ Agreement relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land ("The Agreement").

¹³⁰ *Hansard*, House of Representatives, 18 October 1967, p 1943; 26 October, p 2386; 31 October, p 2457; Senate, 3 November 1967, p 2134; 6 November, p 2201.

¹³¹ Lumb, *op cit* fn 31.

¹³² Lumb contemplated three different means by which the UNCLOS conventions could be incorporated into Australian law: regulations promulgated by the Executive giving effect to the treaties; incorporation of the conventions into domestic legislation without any reference therein to the treaty text; the enactment of an approving statute with the treaty

The Settlement creatively divorced the issuance of titles from the question of jurisdiction by granting to each operator two identical titles—one issued under each of the Commonwealth and state laws—in respect of each licence area. As described in Parliament –

The permittee or licensee will in fact have a dual authority. That is to say, his authority to explore or to exploit will flow to him both from the Commonwealth and from the State concerned.¹³³

The logic behind this approach was that it removed the likelihood of the jurisdictional source of titles being challenged in court by aggrieved parties.¹³⁴ Neither unsuccessful tenderers nor licencees seeking relief from conditions would gain any legal ground by challenging the validity of the overlapping *Petroleum (Submerged Lands) Acts*. A judgement that clarified offshore jurisdiction and thereby invalidated either Act would by default subject an operator to the provisions of the other identical Act. Governments would be unlikely to question the authority of titles either—whether their source was state or Commonwealth law—as the Settlement was negotiated to avoid answering this very question, a commitment embodied in the accompanying Agreement.¹³⁵ In concept at least, this approach would effectively preserve the validity of offshore petroleum titles.

For the overlapping statutes to function as intended the paramountcy of Commonwealth legislation guaranteed by s 109 of the Constitution had to be negated.¹³⁶ To overcome this Constitutional limitation, section 150 of the

scheduled as an appendix. The third option was specifically rejected by Lumb, who favoured a combination of the first two methods of implementation in Australia. In the event, it was the third method which was embodied in the *Seas and Submerged Lands Act* 1973 (Cth) enacted by the Whitlam Labor Government to assert jurisdiction over offshore areas, a point to which the thesis returns in some detail in Chapter 4. R. Lumb, *op cit* fn 29.

¹³³ *Hansard*, House of Representatives [Reginald Connor], 26 October 1967, p 2377.

¹³⁴ Crommelin, *op cit* fn 104.

¹³⁵ Clauses 3, 4, 5, 6, 10, 23 of the Agreement deal with, *inter alia*, requirements to confer, provide assistance, and to enact complementary legislation, consistent with the Settlement's focus upon agreement rather than adjudication.

¹³⁶ Harders, *op cit* fn 109.

Commonwealth *Petroleum (Submerged Lands) Act* stated that it did not affect the operation of any similar state legislation. Several authors commented that despite its purpose, the existence of this provision neither assured the validity of petroleum titles nor protected the Settlement from court challenge.¹³⁷ Nonetheless, the legislation succeeded in protecting petroleum titles irrespective of any eventual resolution of outstanding jurisdictional questions. The legislation provided the statutory framework and guidelines for the offshore scheme while the Agreement contained the intergovernmental arrangements needed for its administration. Within this scheme, the Commonwealth's interest was safeguarded at essential points through "consultation and agreement by the States",¹³⁸ specified to be those areas of federal competency introduced earlier.¹³⁹

Through both its form and the negotiations leading thereto the Settlement was an ambitious and creative national scheme for developing offshore petroleum resources. The respective capabilities of the Commonwealth and states were reconciled in a framework which avoided jurisdictional questions yet satisfied the insistent need to provide certainty of title. The important features of the regime are reflected in the following excerpt from the second reading speech for the P(SL)A –

The Bill is an historic piece of legislation. It is one in which the Commonwealth Government and the several State Governments have joined together in a cooperative effort for the purpose of ensuring the legal effectiveness of titles authorising the search for or production of petroleum in and from our offshore areas. In this cooperative effort the States and the Commonwealth have pooled not only their respective

¹³⁷ Ibid; O'Connell, op cit fn 34.

¹³⁸ *Hansard*, House of Representatives, 18 October 1967, p 1944; Senate, 3 November 1967, p 2137.

¹³⁹ Clause 11 of the Agreement lists a number of matters of Commonwealth responsibility: trade and commerce with other countries and among the States, including navigation and shipping; external affairs; taxation, including taxes in the nature of duties of customs and excise; defence, lighthouses, lightships, beacons and buoys; fisheries in Australian waters beyond territorial limits; and postal, telegraphic, telephonic and other like services. These policy areas are those in respect of which the Commonwealth possesses legislative power, as corresponding to the heads of power listed in section 51 of the Constitution, described in the introduction.

jurisdictional powers but also their administrative and technical resources to produce a legislative scheme which we believe is unique in the world and which is suitable to a federal system of government.¹⁴⁰

2.3.2 Implications of the Settlement

The form of the Settlement confirms that both spheres of government were keen to set aside jurisdictional questions. In strictly legal terms, though, neither governmental sphere was abandoning its assertion of jurisdiction nor derogating from its respective constitutional powers; these were merely being held in abeyance.¹⁴¹ The state-issued mining licences did present particular difficulties for governments, though, especially if the seabed was beyond both the boundaries of states and their legislative competence. By committing to the Settlement and thereby confirming the validity of these offshore titles the Commonwealth was nonetheless careful not to admit an excess of state competency, lest this subsequently erode its own jurisdiction.¹⁴² In other words, neither sphere of government was prepared to concede legal rights.¹⁴³ Avoiding jurisdictional problems and providing certainty of title were clearly instrumental in determining the shape of the Settlement.

A particularly useful analysis of the form taken by the Australian Petroleum Settlement is provided by Taylor.¹⁴⁴ By comparing the 1967 Settlement with the situation that occurred earlier in the United States, he argued that the requirement for a successful resolution of jurisdiction was to concentrate upon the method of dispute resolution rather than being concerned with the nature of the dispute. To this end, Taylor characterized favourably the approach taken to offshore jurisdiction in Australia as "legal accommodation". Indeed, the effusive language employed in Parliament

¹⁴⁰ *Hansard*, House of Representatives, 18 October 1967, p 1941.

¹⁴¹ *Hansard*, House of Representatives, 18 October 1967, pp 1943, 1945, 1959.

¹⁴² *Hansard*, Senate, 6 November 1967, p 2193.

¹⁴³ O'Connell, op cit fn 34.

¹⁴⁴ Taylor, op cit fn 94.

indicates the accommodating nature of the Agreement, which was described variously as: an article of good faith on the part of all governments; a serious declaration of the national interest; a statement of public interest; a fair go;¹⁴⁵ a definite influence on the rate of investment; and a reasonable exercise of federal power.¹⁴⁶

Although there were obvious legal imperatives for reaching the Settlement, the political arrangements underpinning the Agreement were nonetheless expressed in terms exceptionally favourable to states.¹⁴⁷ As argued elsewhere by the author, three particular aspects of the Settlement reveal the extent of the concessions made by the Commonwealth to the states in pursuit of legal accommodation.¹⁴⁸ Firstly, under revenue-sharing provisions of the Agreement, royalties were distributed between the Commonwealth and the adjacent state in the ratio 60:40 in the state's favour.¹⁴⁹ As mentioned, royalties were originally to be shared evenly between the two governmental spheres,¹⁵⁰ but over the two years preceding the 1967 Settlement this ratio became modified to the final proportion.

Of much greater significance than the distribution of royalties is the fact that by accepting the terms of the Settlement—in particular, the overlapping state statutes—the Commonwealth quitclaimed to states its own exclusive jurisdiction over the continental shelf. Legally, this was an excessive gesture. As described at length, in the event of a court case it was felt that states would probably have been able to mount a credible possessory claim over the three-mile territorial waters. With respect to continental shelf areas, however,

¹⁴⁵ *Hansard*, House of Representatives, 1 November 1967, p 2576.

¹⁴⁶ *Hansard*, House of Representatives, 26 October 1967, pp 2395-2397.

¹⁴⁷ Dakin, *op cit* fn 122.

¹⁴⁸ N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204.

¹⁴⁹ Clause 19 of the Agreement.

¹⁵⁰ *Hansard*, House of Representatives, 16 November 1965, p 2741.

there seemed much less doubt that the Commonwealth would be held to exercise exclusive sovereign rights over resources. By enacting the P(SL)A, therefore, the Commonwealth conceded to the states a claim to which these governments were likely not entitled, in spite of its desire to limit state competency so that unresolved Commonwealth jurisdiction was not compromised unnecessarily.¹⁵¹

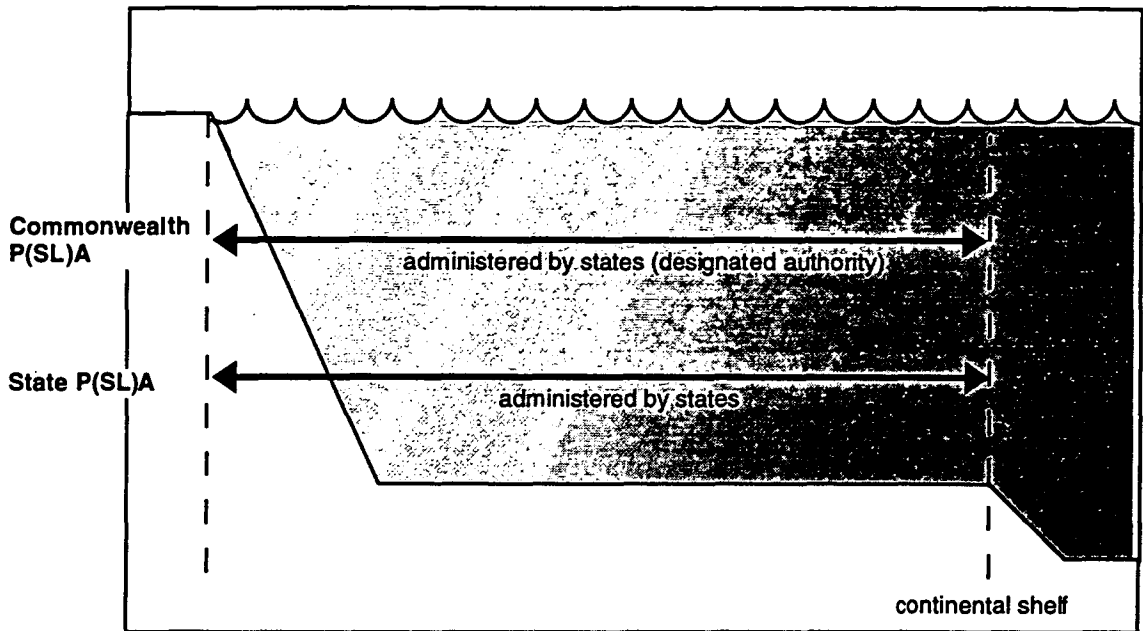
The third and perhaps most striking aspect of the Settlement relates to administration of the newly formed petroleum regime. It was quite clear both by agreement and as effected by the complementary legislation that the regime was to be administered by state governments.¹⁵² Rather than retain for itself an equal or even dominant decision making role, the Commonwealth delegated its decision-making authority under the Settlement to the states. This was achieved by Clause 9 of the Agreement, which stated that the Common Mining Code was to be administered by the designated authority in respect of each state, a role defined by the Commonwealth P(SL)A to be the responsible state ministers.¹⁵³ Through this mechanism, the states were bestowed with all the powers and functions available under the Commonwealth statute in each adjacent offshore area. It was by exercising responsibilities under these two overlapping schemes—acting as the designated authority and administering their own legislation—that states were the decision makers for every aspect of offshore petroleum policy. The administrative arrangements reached in 1967 is depicted in Figure 2, wherein the state minister is seen to exercise all the powers available under both the Commonwealth and state P(SL)A.

¹⁵¹ *Hansard*, Senate, 6 November 1967, p 2193.

¹⁵² *Hansard*, House of Representatives, 26 October 1967, p 2378.

¹⁵³ *Petroleum (Submerged Lands) Act 1967* s 14.

Figure 2. Commonwealth-state offshore petroleum arrangements 1967



Stevenson expresses the role of the designated authority in the following terms –

The states as 'designated authority' were virtually given a free hand to control offshore petroleum, since the federal government agreed to overturn their administrative decisions only if it could demonstrate that such action was required by one of its enumerated legislative responsibilities for such matters as defence, fisheries or external affairs.¹⁵⁴

Aside from the practical implications of the designated authority, the constitutionality of this arrangement was questioned at the time. That is, whether the Constitution permits the power to administer a Commonwealth statute to be conferred upon a state minister.¹⁵⁵ It was precisely in response to this concern that the designated authority device was created; the Commonwealth's P(SL)A refers to the designated authority to avoid referring to the state minister directly.¹⁵⁶ Although this device was of questionable

¹⁵⁴ Stevenson, op cit fn 125 p 38.

¹⁵⁵ "The Designated Authority nominated under the Commonwealth Mining Code is the repository of Commonwealth and State proprietary interests and he is in a true sense the agent of the Commonwealth as well as the State." *Hansard*, House of Representatives, 26 October 1967, p 2378.

¹⁵⁶ Report - Senate Select Committee on Offshore Petroleum Resources (1971) p 7. This point of

efficacy, to this day the Constitutional question raised by the designated authority is still unanswered. As indicated in Chapter One, though, the judiciary has tended to take a favourable view of intergovernmental arrangements as being political rather than legal in nature. As a consequence the mechanism seems to be well established through positive commentary by Australian superior courts.¹⁵⁷

A number of other observations can be made about the features of the Settlement. One point which is often overlooked is the fact that the Settlement itself was not the product of complete support. In fact, the *Petroleum (Submerged Lands) Act 1967 (Cth)* was described in Parliament as "legislation by exhaustion".¹⁵⁸ The bill was the subject of intense dispute from many members and senators in the Opposition as well as from the government.¹⁵⁹ These representatives opined that the Commonwealth exerted jurisdiction over the continental shelf and likely over the territorial sea also, pursuant to the external affairs power.¹⁶⁰ This jurisdiction was itself based upon common law principles as reinforced by the UNCLOS conventions.¹⁶¹ By agreeing to the Settlement these dissenting views held that the Commonwealth was deliberately abdicating to the states its offshore

law is returned to several times in the discussion. See: M. Crommelin, "Petroleum (Submerged Lands) Act: The Nature and Security of Offshore Titles" (1979) 2 *Australian Mining and Petroleum Law Journal* 135-159.

¹⁵⁷ A. Gardner, "Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada" (1994) 11 *Environmental and Planning Law Journal* 104-136.

¹⁵⁸ *Hansard*, House of Representatives, 1 November 1967, p 2574. Debate in the House filled over ninety pages of text over three separate days of debate, and an even longer period in the Senate.

¹⁵⁹ *Hansard*, House of Representatives, 26 October 1967, pp 2386-7. The fact that dissent came from within the ranks of the sponsoring government was held as testament to legislation that was fundamentally a "bad mistake" (p 2389).

¹⁶⁰ *Hansard*, House of Representatives, 18 October 1967, pp 1944, 1954; 26 October, pp 2390, 2392-3, 2397; Senate, 3 November 1967, p 2135; 6 November, p 2185.

¹⁶¹ *Hansard*, House of Representatives, 26 October 1967, pp 2369, 2386; *Hansard*, Senate, 6 November 1967, p 2184.

responsibilities.¹⁶² In the words of one government opponent of the draft legislation –

I know that what I have said will be unpopular in many quarters. I would not have said it—I do not lightly go against the Government—unless I believed this was a matter of supreme importance in which the Government has made a rather bad mistake.¹⁶³

The Labor Opposition went further in its criticisms, bemoaning the fact that the Commonwealth had proclaimed a continental shelf in 1953 and acceded to the convention five years later, but then "typically, allowed the matter to rest".¹⁶⁴ As it had done during enactment of the *Pearl Fisheries Act* in 1953, the Opposition rejected the Government's petroleum legislation not for its attempt to emplace a policy framework, but for the delay in so doing and the precise terms thereof –

We attack this legislation root and branch. We say that it is wrong both in principle and in form and that it is a further sacrifice of the natural assets of Australia and the birthright of its people ... Profound legal difficulties are said to have been overcome. What humbug this is, coming from a national government that has supinely allowed the States to intrude unconstitutionally into its sovereign field.¹⁶⁵

A number of objections to the Settlement were directed at the Agreement by which the whole scheme was to be administered. Despite being the cornerstone of the offshore arrangements the Agreement was not given legislative support, and worked instead on the basis of political faith.¹⁶⁶ That is, the mechanism providing for Commonwealth consultation was written into the Agreement only—not the legislation—producing what Lumb terms "a lack of correspondence between the two".¹⁶⁷ In other words, the Settlement

¹⁶² *Hansard*, House of Representatives, 26 October 1967, pp 2385, 2390, 2394; Senate, 3 November 1967, p 2154.

¹⁶³ *Hansard*, House of Representatives [William Wentworth], 26 October 1967, p 2389.

¹⁶⁴ *Hansard*, House of Representatives, 26 October 1967, p 2368.

¹⁶⁵ *Hansard*, House of Representatives [Reginald Connor], 26 October 1967, pp 2367-2368.

¹⁶⁶ *Hansard*, House of Representatives, 26 October 1967, p 2395; 31 October, pp 2458-2459; 1 November, p 2575.

¹⁶⁷ Lumb, *op cit* fn 31 p 461.

relied solely upon the integrity of state governments for the framework to operate as agreed.¹⁶⁸ Furthermore, it was noted that by honouring the Agreement the Commonwealth was prevented by clauses 6 and 7 thereof from altering the legislation without state concurrence.¹⁶⁹ This proposition, which restricted Parliament's power to alter legislation, was untenable to many representatives, striking as it did at the very heart of the institution.¹⁷⁰ It was noted also that states could even dispute the Commonwealth's view on those few matters which the Agreement recognized as falling exclusively within the federal province.¹⁷¹ In the words of one legislator, "There are in the Agreement some extraordinary provisions which apparently aim at tying the hands of the Parliament."¹⁷²

In response to the profound objections raised in relation to the draft legislation it was proposed to refer the *Petroleum (Submerged Lands) Bill* to a Senate committee for closer consideration.¹⁷³ Such a referral would ordinarily occur before legislation is passed by the relevant House, so that any recommendations arising therefrom could be incorporated into the bill. There was concern expressed, however, that the delay incurred while the committee conducted its review would translate to a two year drought in the production of offshore oil.¹⁷⁴ Consequently, the Senate agreed to pass the draft legislation unamended, whereafter it would be referred immediately to the Senate Select Committee on Off-Shore Petroleum for investigation in a

¹⁶⁸ Clause 26 of the Agreement reads "The Governments acknowledge that this Agreement is not intended to create legal relationships justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof." In this respect, it was exclaimed in Parliament - "Beautiful sentiments! Most laudable sentiments!" *Hansard*, House of Representatives, 26 October 1967, p 2372.

¹⁶⁹ *Hansard*, House of Representatives, 26 October 1967, p 2386; *Hansard*, Senate, 6 November 1967, p 2185.

¹⁷⁰ *Hansard*, Senate, 6 November 1967, pp 2188-2189.

¹⁷¹ *Hansard*, Senate, 6 November 1967, p 2193.

¹⁷² *Hansard*, Senate, 6 November 1967, p 2184; House of Representatives, 26 October 1967 p 2386.

¹⁷³ *Hansard*, Senate, 6 November 1967, p 2189.

¹⁷⁴ *Hansard*, Senate, 6 November 1967, p 2212.

"leisurely, unhurried way."¹⁷⁵ The limitation to this approach was the fact that because a senator's statement could not rule that legislation was *ultra vires*, a challenge to the High Court would be required to determine the validity of arrangements, and it was therefore arguable to await the findings of the Senate Select Committee.¹⁷⁶ In the interest of national development, however, it was agreed to adopt the modified Committee motion. The report of the Committee, delivered at the very end of 1971, was to embolden the following two federal governments in their attempts to reclaim Commonwealth jurisdiction over the offshore.

Given the persuasive arguments made in Parliament that the continental shelf fell within the sovereign rights of the Commonwealth—and the wide support in this regard found in the legal literature—the important task is to explain why the Australian Petroleum Settlement preserved a dominant, almost exclusive, role for the states offshore. The keenness of the state governments in adopting the 1967 Settlement is self evident: by entering into the Agreement they gave away nothing and secured jurisdiction over vast offshore tracts, an approach which was consistent with their historical approach to marine resources policy.¹⁷⁷ Moreover, it was important to settle the matter expediently lest Constitutional questions frustrate the arrangements agreed upon.¹⁷⁸ These factors provide only a partial explanation of the form of the Settlement, though. Whilst the desires of states to settle the offshore situation provides the general basis for the scheme agreed upon in 1967, this alone does not adequately explain the extent of the concessions made by the Commonwealth. At least one legal commentator at the time recognised this fact, remarking that "[I]t would be wrong, however, to

¹⁷⁵ *Hansard*, Senate, 6 November 1967, p 2122.

¹⁷⁶ *Hansard*, Senate, 6 November 1967, p 2196.

¹⁷⁷ *Hansard*, Senate, 6 November 1967, p 2185.

¹⁷⁸ *Hansard*, Senate, 6 November 1967, p 2213.

suppose that the joint scheme was embarked upon solely, or even primarily, for reasons of law."¹⁷⁹

2.3.3 Explaining the Settlement

It is well reported that the motivation behind the arrangements reached in 1967 was to avoid jurisdictional questions while providing certainty to operators, in the greater interest of national development.¹⁸⁰ As this section shows, interpretations of the Australian Petroleum Settlement are focussed narrowly upon the legislative framework enacted, and miss the better part of the story. Upon closer review of the public record it becomes apparent that the terms of the Settlement were the result of an admixture of influences, being the bargaining strength of state governments and the oil industry relative to the Commonwealth and the latter's technical and administrative limitations, which were themselves the perpetuation of the Commonwealth's historical absence from the marine resources field. By examining these factors more fully, the Settlement is better appreciated as being the product of the policy making capabilities of each governmental sphere in 1967 rather than simply the outcome of legal and jurisdictional uncertainties.

The three influences which shaped the Settlement are captured succinctly in the following comment made in Parliament during debate on the *Petroleum (Submerged Lands) Bills* –

In our consideration of these measures [the draft legislation], we must acknowledge three things—the strong hand of Sir Henry Bolte [the Victorian Premier], the attitude of the oil companies and the weakness of the Commonwealth Government. If anyone wants evidence of issues of extreme importance, it is found here. I put it to the House this

¹⁷⁹ Harders, op cit 109 p 425.

¹⁸⁰ Crommelin, op cit fn 104. Cullen in particular describes the Settlement as an arrangement steeped in agreement based upon the common goal of avoiding legal and Constitutional problems; Cullen, op cit fn 2 pp 61-64.

evening that many aspects of these matters ought to be more carefully considered, for they are the very crux of these Bills.¹⁸¹

The discussion now turns briefly to consider these contextual factors. Although the influences are discussed separately below it will become obvious that all three are complementary and inter-related, and only by considering the three together is the shape of the Settlement fully understood.

2.3.3.1 *The bargaining position of the states*

The factor which perhaps most influenced the shape of the Settlement was the strength of the states relative to the Commonwealth. Hansard records show that the states as a bloc lead by Victoria dominated negotiations over the Agreement and legislation.¹⁸² As shown already with respect to one aspect of the Settlement—royalty arrangements—the states persuaded the Commonwealth that they should naturally regulate the petroleum regime and be recompensed accordingly.¹⁸³ This same ability to prevail is also seen in terms of the Settlement more broadly. It is recalled that offshore activity during the 1960s was concentrated in waters adjacent to Victoria. It was therefore in this state's interest to secure an arrangement favourable to state governments within the context of the national approach to offshore petroleum that was being pursued.

Parliamentary debates reveal that one individual, the Victorian Premier Henry Bolte, was particularly influential in shaping the Settlement. Stevenson also recognises Premier Bolte "played a central role" in negotiating the Settlement.¹⁸⁴ Over the course of intergovernmental negotiations Bolte directly petitioned the Prime Minister, Harold Holt, to ensure that the final

¹⁸¹ *Hansard*, House of Representatives [Anthony Luchetti], 26 October 1967, p 2384.

¹⁸² *Hansard*, House of Representatives, 26 October 1967, p 2394.

¹⁸³ Haward, *op cit* fn 49 pp 99-119.

¹⁸⁴ Stevenson, *op cit* fn 125 p 68.

arrangement was generous to Victoria, and thereby to all the states. That the Prime Minister was so able to be influenced by Bolte was the subject of outrage during debate on the *Petroleum (Submerged Lands) Bills*. The following comment expresses these sentiments, as well as identifies some of the other linkages which influenced the shape of the Settlement –

One of the most dangerous features of this deal is the arrogant attitude of Victoria in particular towards the Commonwealth Constitution and to known international law governing control of the area outside the continental shelf. Mr Bolte has snapped his fingers at the Commonwealth Constitution. But with this unprecedented arrogance by the Bolte Government is the suppine surrender of the Holt Government to the noisy arrogance of both Mr Bolte and the oil monopoly. We have never in our history seen such a suppine surrender by a Commonwealth Government as we have seen over this deal.¹⁸⁵

Although Victoria was the state with the most at stake in 1967, it is equally important to recognize that the Victorian Government was merely the most vocal partner in an alliance comprising all Australian states.¹⁸⁶ With few exceptions, scholars have generally overlooked the fact that all the states of Australia have long coastlines, an influence introduced in Chapter One as having shaped Commonwealth-state interaction in all areas of Australian marine policy.¹⁸⁷ In terms of the 1967 Settlement, this incident of federation meant that every Australian state was at risk of ceding to the Commonwealth controls over potentially valuable offshore resources, precisely as had occurred fifteen years earlier in the situation regarding commercial fisheries. As will be seen, commensurate with the prospectivity of offshore areas being disproved over time states have become disinterested in pursuing a united petroleum policy, inversely to the Commonwealth's growing interests and confidence in this field.

¹⁸⁵ *Hansard*, House of Representatives [Gilbert Duthie], 26 October 1967, p 2390.

¹⁸⁶ *Hansard*, Senate, 6 November 1967, p 2217.

¹⁸⁷ The few analyses which have identified Australian coastalness as an influence on marine policy are those by Evans and Bailey, *op cit* fn 148; Haward, *op cit* fn 46; Opekin and Rothwell, *op cit* fn 101.

A second aspect arising from Australia's coastal orientation is that there was held in 1967 a common view of offshore jurisdiction at the state level regardless of the party forming government. Four of the six Australian states at the time were ruled by Liberal coalition governments while two—Tasmania and South Australia—were governed by Labor. Yet for the reasons outlined above all state governments embraced the 1967 Settlement in a politically bipartisan approach to offshore resources policy, ensured by the fact of all states having coastal margins and possible offshore claims. This high degree of state political bipartisanship is also recognized by Haward as characterizing the Settlement.¹⁸⁸

The willingness of the Labor states to support the Settlement infuriated the federal Labor Opposition.¹⁸⁹ As has been seen during Parliamentary debates, Labor was vitriolic in criticising the Commonwealth's failure to assert jurisdictional superiority over the continental shelf in 1967, espousing as it did a centralist approach to offshore policy. That the Labor states had agreed to the Settlement was seized upon by the Government as evidence of the success of the Agreement and the *Petroleum (Submerged Lands) Bills*, and was used to lambast the Opposition –

The Opposition has said that Mr Dunstan [South Australian Premier] and Mr Reece [Tasmanian Premier] were threatened and that they were cowards. How can they be anything but cowards if they do not believe in this Agreement—the Opposition has said they do not—yet signed the document? In other words, the Opposition makes the claim that these two Labor Premiers who, with the other four Premiers, signed the Agreement, were cowards ... I would like to know what more disgraceful attack could be made on two Labor Premiers by members of their own Party.¹⁹⁰

Despite the passionate defence of state governments implicit in this comment and embodied in the Settlement, the extraordinary commitment the

¹⁸⁸ Haward, *op cit* fn 49 pp 112-113.

¹⁸⁹ *Hansard*, House of Representatives, 26 October 1967, p 2393; Senate 6 November 1967, p 2215.

¹⁹⁰ *Hansard*, Senate [Francis McManus], 6 November 1967, p 2216.

Commonwealth made to the states in 1967 needs to be placed firmly in perspective. Quite simply, the Settlement was not the result of a clearly articulated vision, and was arrived at less by Commonwealth design than it was by default. The influence of state governments, as found in their bargaining strength and offshore policy experience, cut across partisan political lines to profoundly shape the terms of the Settlement.

In the next phase of jurisdictional settlements, Labor was able to advance its centralist policy with respect to the offshore over the strong protestations of Liberal and Labor state governments alike. An even more interesting development is that pursued by Liberal Commonwealth governments, which have also come to increasingly narrow their view of offshore federalism despite espousing an overt federalist philosophy. Subsequent to the 1967 Settlement, no Commonwealth government has returned to the generous concessions originally made thereunder. This shift in policy reflects—in part at least—a growing confidence with marine resources policy making at the Commonwealth level, independent of the particular government in power. Liberal and Labor federal governments now differ only in the degree to which they exert the Commonwealth's paramountcy over offshore resources.

2.3.3.2 The influence of the oil industry

The states were joined by powerful industry interests in their efforts to settle offshore arrangements in 1967. That there was a need to create a reliable and certain regime for investment is beyond dispute. However, several major companies sought to preserve existing contractual arrangements that gave to them concessions far in excess of the needed investment stability. Haward, for example, notes that the state of Victoria had granted Esso-BHP rights to explore in respect of the entirety of Bass Strait.¹⁹¹ This concern was echoed in Parliament –

¹⁹¹ M. Haward, *Institutions, Interests Groups and Marine Resources Policy* (University of

I believe that the Commonwealth in this case has abandoned a very strong position that it had vis a vis the States and vis a vis the control of these waters and of the continental shelf and has permitted itself to rubber stamp an agreement that had been made between Victoria and Esso-BHP. The Commonwealth need not have done that. No doubt the Premier of Victoria felt the best bargain he could drive quickly would be the best in the long run because later on there would be questions on his constitutional right to make a bargain.¹⁹²

Under the Settlement, oil exploration companies would retain largely intact their pre-existing rights, an arrangement that caused some representatives especial disquiet.¹⁹³ Moreover, the agreed royalty rate of 11% was described as “disgracefully low”.¹⁹⁴ In the words of one senator –

I submit, Mr President, that this Government has been dictated to by foreign owned and controlled petroleum companies that have the power to make and break governments in this country or any other ...It has been bulldozed by the oil companies into proceeding with these measures.¹⁹⁵

The influence of the oil industry was clearly important in shaping the 1967 regime, as shown particularly by its insistence on preserving existing conditions of access granted by state governments. The partnership between the oil industry and the attitude of state governments, together with the need to provide celerity to the nascent offshore regime, proved irresistible to the federal government. The Commonwealth appeared to succumb to this combined pressure and endorse a regime which gave to these other interests considerable benefits, and little to itself.

2.3.3.3 *The Commonwealth's inexperience with resource development*

The third factor mentioned above—Commonwealth weakness—is essentially the denominator in negotiations over the Settlement. The

Tasmania, MA thesis, 1986) p 177.

¹⁹² *Hansard*, Senate [Samuel Cohen], 6 November 1967, p 2213.

¹⁹³ *Hansard*, Senate, 6 November 1967, p 2229. See also *Hansard*, House of Representatives, 26 October 1967, pp 2390, 2394.

¹⁹⁴ *Hansard*, House of Representatives, 26 October 1967, p 2390.

¹⁹⁵ *Hansard*, Senate [James Keefe], 6 November 1967, p 2229.

Commonwealth's legislative policy in 1967 was the legacy of its tradition of leaving to states the management of marine resources, dating back to fisheries policy in the 1940s and 1950s. As a consequence of this earlier approach, the Commonwealth lacked the capacity to regulate offshore petroleum activity and was considerably weakened in its negotiating position during the 1960s. The Commonwealth's timidity, moreover, is also understood by reference to the international context for offshore petroleum development, where it has been seen that "Australia consistently sought international agreement first, and was not ahead of the field in the assertion of new maritime claims."¹⁹⁶

It was observed by several commentators that the technical capability for regulating mining resided with the states, as derived from onshore minerals development activities.¹⁹⁷ As described previously, the Commonwealth was without capabilities in this area and was necessarily dependent upon the states for most of the technical and economic input to offshore petroleum policy and regulation. Moreover, by adopting the Settlement "[t]he scheme has also done away with the need for an expensive duplication of Commonwealth administrative facilities in the mining field."¹⁹⁸ The Commonwealth therefore not only lacked any offshore capability but neither did it seek to develop same.

In Parliament, the Commonwealth's "inexperience and lack of economic sophistication" was accepted as explanation for its delay in developing offshore resource policy capabilities. However, these excuses were condemned as sufficient reason for entering into the Agreement and enacting the quitclaim legislation.¹⁹⁹ It seems, therefore, that whilst the government

¹⁹⁶ Landale and Burmester, *op cit* fn 38 p 391.

¹⁹⁷ Harders, *op cit* fn 109; Haward, *op cit* fn 49 pp 113-114.

¹⁹⁸ Lumb, *op cit* fn 31 p 461.

¹⁹⁹ *Hansard*, House of Representatives, 26 October 1967, p 2369.

and Opposition were prepared to admit to the Commonwealth's deficiencies in natural resources policy, the latter at least was unwilling to allow these to be perpetuated by the Settlement. In the event, the ease with which the states could extend offshore their regulatory regimes negated the Commonwealth's desires to emplace a similar regime, especially when put in the context of the pressures discussed already. The Commonwealth was simply unable to assume responsibilities for administering the offshore regime even if it so desired.

2.4 CONCLUDING COMMENTS

The Australian Petroleum Settlement was a framework within which certainty could be given to offshore petroleum titles while setting aside questions as to jurisdiction between the Commonwealth and states. Although these factors are well recognized as shaping the Settlement, a number of other influences explain why the Agreement and legislation giving effect to the Settlement amounted to a continued withdrawal by the Commonwealth from the field of marine resources policy. The Commonwealth's technical and administrative weakness, and the strength of the states and their arrangements with oil companies, fundamentally determined the shape of the Settlement. This chapter has shown that the Settlement was not agreed upon as harmoniously as many legal commentaries suggest. As summarized in the bitter Parliamentary debates –

Tongue in cheek, the State representatives at conferences with the Commonwealth have asserted State sovereignty over the continental shelf as a bargaining factor ... In any constitutional challenge to Commonwealth sovereignty over the continental shelf, an attacking State would not hit the deck. The Minister, the Prime Minister and their legal advisers, as well as their State counterparts, are well aware of this. Any State attempting to take this course would expose itself to justifiable legal humiliation and would wreck the flimsy political compromises on which this measure is based. The second reading speech made by the Minister is a classic example of *argumentum ad ignorantiam*. The simple truth is that the Commonwealth has

acquiesced and concurred, whether by sloth, indifference or otherwise, in the usurpation by the States of its sovereign powers.²⁰⁰

Stevenson confirms that such criticism of the Settlement is justified. He identifies three particular defects with the P(SL)A: the surrender to Victorian Premier Bolte of Commonwealth authority; the prominence given to foreign oil companies; and the undertaking to Parliament not to amend the legislation without the agreement of state governments.²⁰¹

In terms of shaping Commonwealth and state relations offshore, the consequences of the Commonwealth's policy approach as embodied in the Settlement were two-fold. Firstly, the dominance of the states as policy makers negated the requirement of the Commonwealth to develop its own marine policy expertise, capabilities that were already fundamentally lacking in the 1960s. Following from this, the early role of state governments as fisheries and then petroleum managers assured them of a continued key role in marine policy formation.

The offshore petroleum settlement is therefore appropriately considered as a reflection of the roles that the two spheres of government could fill in policy and administration at the time given their respective capabilities, which includes but is not limited to knowledge of legal and Constitutional responsibilities. Confirmation of this argument is found in the observation that the extraordinarily lengthy debates surrounding the legislation were concerned with the appropriateness of the arrangements rather than the issue of jurisdiction. Explanation as to the Commonwealth's acquiescence to the Settlement seems found in a combination of continued inexperience and a reluctance to venture into an area of policy in which it had few capabilities. A leading Australian scholar captures the essence of this denouement –

²⁰⁰ *Hansard*, House of Representatives [Reginald Connor], 26 October 1967, p 2369.

²⁰¹ Stevenson, *op cit* fn 125.

"[I]n the mid 1960s the discovery of extensive hydrocarbon reserves in Bass Strait led to discourse about the *respective roles* of the Commonwealth and states in maritime affairs and revenue sharing. Attempts were made to develop a collective 'Petroleum Agreement' (1967), based upon the notion of mirror legislation by both levels of government."²⁰² [emphasis added].

The Commonwealth sought later to reclaim offshore authority, both directly and through less overt measures. But the approach laid down during the immediate post-war fisheries development took hold and shaped the Commonwealth's early experience with petroleum, a position which was in consequence difficult to reverse. It was only through direct challenge to this original arrangement—in particular, by explicitly raising the question of offshore jurisdiction—that the Commonwealth was able to effect change to the petroleum regime.

As shown, questions pertaining to jurisdiction were certainly not the sole determinant of the 1967 Agreement and legislation, and were in fact overshadowed by other influential factors. In effect, though, avoiding jurisdictional questions forestalled future Commonwealth action because these had still to be answered before the Commonwealth could advance its own petroleum policies. In the words of one commentator –

... apparently the States would not yield the appearances of power left to them ... the need to preserve the facade of State pretensions has obscured the true nature of what is occurring, and has given the impression that the Commonwealth is merely endorsing a division agreed upon between the States and legally effected by them.²⁰³

The discussion now turns to examine the second phase in the evolution of the offshore petroleum regime. During the early 1970s the Commonwealth sought to overturn the arrangements agreed upon in 1967 and assert

²⁰² B. Davis, "National Responses to UNCED Outcomes: Australia", in L. Kriwoken, M. Haward, D. VanderZwaag and B. Davis (ed), *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International, London, 1996) pp 25-40, p 27.

²⁰³ O'Connell, *op cit* fn 34. p 47.

supremacy over the offshore, which it was able to do with full legal efficacy. However, the historical context of the P(SL)A assured the Commonwealth's approach of being shortlived, notwithstanding that some of the changes enacted under Whitlam outlived the government, and evolved to shape the third phase of the regime.

Chapter Three

Commonwealth Assertiveness and the Offshore - 1968-1975

The period 1968-1975 represents the second phase in the evolution of the *Petroleum (Submerged Lands) Act*. Two features of this period distinguish it from the immediate preceding years of the Australian Petroleum Settlement. Firstly, it was during this time that the Commonwealth made greater use of constitutional powers to advance its offshore resource interests through legislation, causing a rapid deterioration in relations with state governments and the oil industry. Because the congeniality of the arrangements made in 1967 endured for so few years it is difficult to consider the Settlement a success, as has been commented in the literature.¹ Also, the years following the Settlement marked the beginnings of an increasingly bipartisan approach of successive federal governments towards offshore petroleum policy. Unlike the earlier situation when the Coalition Government and Labor Opposition espoused contrasting policies, governments of both persuasion during the early 1970s introduced legislation to assert Commonwealth paramountcy over the offshore. It is possible, therefore, to discern the beginnings of a definable Commonwealth position with respect to offshore petroleum during this phase.

The first move in this direction—the attempt in 1970 by the Gorton Government to enact the *Territorial Seas and Continental Shelf Bill*—floundered because it had little support other than the Prime Minister's. Although Gorton lost the Prime Ministership over this fiasco—and the Government fell from power soon thereafter—the policy embodied within

¹ R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" (1988) 6 *Journal of Energy and Natural Resources Law* 213-247.

the bill nonetheless signalled a shift in Commonwealth thinking towards offshore oil, both politically and within the bureaucracy.²

The election of the Whitlam Labor Government in 1972 provided the political impetus to conclude what Gorton had been unable to do. As a matter of priority upon assuming office, the *Seas and Submerged Lands Act* was enacted to declare Commonwealth jurisdiction over the territorial sea and continental shelf, thereby triggering a High Court challenge by the states. This brief but radical period of offshore jurisdiction has been treated at length in the literature.³ Generally ignored, however, is the fact that the *Seas and Submerged Lands Act* was merely the offshore plank of a resources policy being developed from the centre. The legislation was therefore less a subjugation by the Commonwealth of offshore petroleum than it was a vehicle for implementing national policies for the conservation and development of marine resources.⁴

The Commonwealth's desires to assert jurisdiction over the offshore were both shaped and enabled by a range of converging factors, not least of which was the emerging Law of the Sea Convention. During the formative UNCLOS III negotiations at this time the Commonwealth was able to better align its national marine policies with legal concepts gaining popularity internationally, and so harmonize the two policy areas. Law of the Sea policy

² G. Stevenson, *Mineral Resources and Australian Federalism* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1976).

³ M. Crommelin, "Federal-Regional Cooperation: A Comparative Perspective", in J. Saunders (ed), *Papers presented at the 2nd National Conference on Natural Resources Law, 1985 Managing Natural Resources in a Federal State* (Carswell, Calgary, Canada, 1986) pp 295-321; R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* The Federation Press, Sydney, 1990) pp 86-90; E. Fitzgerald, "The Seaweed Rebellion: Federal-State Conflicts Over Offshore Energy Development in the United States, Canada, and Australia" (1992) 7 *Connecticut Journal of International Law* 255-309; R. Hildreth, "Managing Ocean Resources: New Zealand and Australia" (1991) 6 *International Journal of Estuarine and Coastal Law* 89-126.

⁴ B. Galligan and C. Fletcher, *New Federalism, Intergovernmental Relations and Environment Policy* (Federalism Research Centre, The Australian National University, Canberra, 1993).

in turn broadened the domestic bases of Commonwealth offshore legislation to encompass fisheries resources and protection of the marine environment.⁵

This chapter recounts the brief but substantial period of Commonwealth offshore ascendancy between 1968 and 1975. Part one introduces several fisheries and petroleum policy events that compounded to encourage assertive Commonwealth action generally. The second part outlines resources policy under the Whitlam Commonwealth before the particular details of offshore legislative policy are reviewed in detail in the third part. From this chapter it appears that Whitlam's legacy was a notable shift in offshore responsibilities towards the Commonwealth, the content of which was massaged and refined, but not rejected by subsequent governments.

3.1 DEVELOPMENTS IN FISHERIES POLICY

Advances in fisheries law and policy during the late-1960s motivated the Commonwealth to strengthen its role in offshore policy generally, and particularly with respect to offshore petroleum legislation. There were two important dimensions to this expansion in fisheries policy: new legislative assertions pertaining to controls over sedentary fisheries and positive commentary by the High Court of Commonwealth offshore jurisdiction. Each of these developments are discussed briefly below, especially in terms of their relevance to offshore petroleum legislative policy.⁶

⁵ D. Rothwell and M. Haward, "Federal and International Perspectives on Australia's Maritime Claims" (1996) 20 *Marine Policy* 29-46.

⁶ A third fisheries policy development at this time further evidences the Commonwealth's slow but growing interest in consolidating its jurisdiction over marine resources. In 1968, the *Fisheries Act* 1952 (Cth) was amended to establish the 12-mile declared fishing zone (DFZ) to protect Australian fisheries from foreign fishing incursions. The DFZ was therefore the first assertion of offshore jurisdiction by reference to a fixed linear distance, unlike the P(SL)A which asserted Australian jurisdiction over the continental shelf without defining an outer limit. Although the *Fisheries Act* 1967 (Cth) fell short of establishing a territorial sea the DFZ was nonetheless viewed by some representatives as a positive move in this eventual direction. See: *Hansard*, House of Representatives, 8 November 1967, p 2348. H. Burmester, "Australia and the Law of the Sea", in J. Crawford and D. Rothwell (ed), *The*

3.1.1 Continental Shelf (Living Natural Resources) Act 1968 (Cth)

One year after the Australian Petroleum Settlement was reached the Commonwealth enacted the *Continental Shelf (Living Natural Resources) Act* (CSLNR Act) to bring the continental shelf firmly under Commonwealth jurisdiction for the purposes of conserving fish resources.⁷ The CSLNR Act updated the sedentary fishing regime by repealing the *Pearl Fisheries Act* 1953 (Cth) and replacing it with one based upon the provisions of the 1958 Convention on the Continental Shelf.⁸ Because of the heightened political interest in offshore petroleum at the time debate on the CSLNR bill became distracted by the prospectivity of the continental shelf, as had occurred with the earlier *Pearl Fisheries Act*. It was perhaps logical that the two policy areas should converge somewhat, given that fisheries management and petroleum development alike have interests in the continental shelf. Rather than examining the proposed scheme for exploiting fisheries resources, however, debate on the Bill was devoted almost entirely to canvassing broader continental shelf policy options.

Both the Government and Opposition took the opportunity to contemplate the nature of continental shelf rights and responsibilities available under the Convention. There were particular concerns over the technical and legal components to the Commonwealth's claims as these related to offshore petroleum.⁹ It is recalled from Chapter Two that the continental shelf was defined in 1958 by reference to a depth rather than a

Law of the Sea in the Asia Pacific Region (Kluwer Academic Publishers, Dordrecht, 1995) pp 51-64; I. Shearer, "International Legal Aspects of Australia's Maritime Environment", in *Australia's Maritime Horizons in the 1980s* (Occasional Papers in Maritime Affairs: 1, 1982) pp 1-8.

⁷ M. White, *Marine Pollution Laws of the Australasian Region* (The Federation Press, Sydney, 1994).

⁸ C. Harders, "Commonwealth and State Jurisdiction Over Off-Shore Areas" (1977) 1 *Australian Mining and Petroleum Law Association Journal* 7-16; R. Lumb, "Sovereignty and Jurisdiction Over Australian Coastal Waters" (1969) 43 *The Australian Law Journal* 421-438.

⁹ *Hansard*, House of Representatives, 28 November 1968, pp 3420, 3425, 3433-5.

fixed distance criterion.¹⁰ Ten years later this approach was creating problems for Commonwealth policy-making as members struggled to temper their enthusiasm for developing offshore petroleum resources using new technologies with the constraints presented by the legal framework for their application. The Commonwealth's approach to this problem is amply expressed by the Attorney-General [Nigel Bowen] –

Up to the present the sea covering the continental shelf has been a mental and technological hazard to development of the continental shelf ... We were prepared to remove the overburden on the land to get at the coal beneath but were not prepared to go through the water to get at the wealth on the sea bed. But technological advances in recent years have been of such a nature that we can now do this. Technology has advanced so far that exploration of the sea bed in other parts of the world is being carried out at great depth. We have seen, for example, in Australia the discoveries of oil in Bass Strait. Enormous wealth is there ... This interest would be to extend our territorial claims—even our sovereignty—as widely away from the mainland as we could consistent with international law.¹¹

Unlike the previous year when the Opposition was outraged by the P(SL)A and the Agreement, the CSLNR bill was received much more positively by Parliament. One outstanding problem, though, was the legislation's continued failure to declare the outer extent of Australian jurisdiction over the continental shelf.¹² The area to which the CSLNR Act applied was to be determined by proclamation at the prerogative of the Governor-General, a mechanism which allowed for offshore jurisdiction to be exerted selectively at a pace which comported with developments in international law.¹³ If enacted, however, it was claimed that the legislation would repeat the "neglect, the inefficiency and the incompetence" of continental shelf policy enacted by the *Pearl Fisheries Act* fifteen years earlier by not effecting Commonwealth offshore control through a clear legislative assertion.¹⁴

¹⁰ Convention on the Continental Shelf, Article II.

¹¹ *Hansard*, House of Representatives, 28 November 1968, p 3433.

¹² *Hansard*, House of Representatives, 28 November 1968, pp 3420, 2342-5.

¹³ *Continental Shelf (Living Natural Resources) Act* 1968 (Cth) ss 5, 11.

¹⁴ *Hansard*, House of Representatives, 28 November 1968, p 3430.

This method for extending national sovereignty contained in the CSLNR bill was criticized for leaving doubtful the outer extent of Commonwealth jurisdiction, especially when compared with the provisions of the Continental Shelf Convention. Opposition members exhorted the Commonwealth to fully avail itself of those opportunities relating to depth and resources, particularly by allowing Australia's continental shelf to ambulate seaward. If challenged in this interpretation of offshore jurisdiction the Commonwealth should undertake to have it clarified in the courts, rather than continue to avoid answering this thorny question.¹⁵ The Labor Opposition summarized the Commonwealth's approach thus –

To me it is quite important that the parties to the convention had in contemplation exploitation of the continental shelf in certain cases well beyond the 200 metre limit—they did not define this limit. But the area of continental shelf within the 200 metres depth in the case of a nation such as Australia is a huge one. I would say that no nation in the world today has an easier means of asserting its domination over a vast area of continental shelf than has Australia ... My criticism of the Government is this: We have not used our tactical geographic and strategic advantage as we should have done. We have not led in asserting our very definite rights. We have in the process lagged far behind other countries. The Government, to put it very charitably, has been overly timid.¹⁶

As discussed in Chapter Two, the Commonwealth's timidity in enacting continental shelf legislation is attributable in part to its policy of making offshore claims only when these are permissible internationally, whether under treaty or customary law. This legislative approach is evident throughout all the evolutionary phases of the offshore petroleum regime. During the 1950s Australia moved to lay claim over offshore resources in parallel with UNCLOS I initiatives, an approach which is again seen in the

¹⁵ *Hansard*, House of Representatives, 28 November 1968, p 3431. Upon election to government in 1972, this very approach was pursued by Labor in the form of the *Seas and Submerged Lands Act* which was enacted specifically to provoke a judicial challenge and thereby invoke a final determination of offshore jurisdiction.

¹⁶ *Hansard*, House of Representatives, 28 November 1968, p 3430. This comment was made by Rex Connor who as resources minister under the subsequent Whitlam Labor Government promoted a very assertive Commonwealth resources policy [more later].

next chapter with respect to the Third Law of the Sea Conference and the resultant treaty text. Throughout UNCLOS III negotiations the Commonwealth worked assiduously to preserve the 1958 definition of the continental shelf—once it had belatedly comforted itself with this formula, that is—in preference to adopting a more precise measure of elongated offshore boundaries, because of the benefits to Australia of retaining the older formula.¹⁷

The Commonwealth's policy of acting in a manner that was consistent with international law is again unmistakable in 1968. During debate on the CSLNRAct the Government emphasized the international responsibility of its policy –

Normally Australia, in its international dealings, has been one of the responsible nations of the world. It has tended to obey, observe and respect international law. It is possible for a country to set international law at naught ... This has not generally been Australia's approach. I believe that Australia's interests can be safe-guarded adequately in the present situation, particularly with the extremely fast pace of development in international law, without adopting a defiant attitude such as the one I have mentioned and taking a course of action which would put us outside the pale of international law.¹⁸

The Commonwealth at this time also began to take a rather more active approach towards progressing the emerging legal code for international oceans law. In defence of its policy of linking foreign diplomacy with national legislative policy, the Government highlighted its role in preparatory work for UNCLOS III [discussed in detail in part 3.4 below].¹⁹ Moreover, criticism by Labor of the CSLNR bill was temperate compared with the vitriol that characterized the 1953 and 1967 parliamentary debates. In combination, there

¹⁷ A. Bergin, "Australia and Deep Seabed Mining" (1982) 36 *Australian Outlook* 45-50; A. Bergin, "Australia and UNCLOS 3" (1983) 29 *Australian Journal of Political History* 427-439; M. Landale and H. Burmester, "Australia and the Law of the Sea - Offshore Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 390-416.

¹⁸ *Hansard*, House of Representatives [Nigel Bowen, Attorney-General], 28 November 1968, p 3436.

¹⁹ *Hansard*, House of Representatives, 28 November 1968, pp 3435-6.

appears to be emerging a degree of political maturity and consistency in Commonwealth policy development by 1968.

From the Parliamentary record it is evident that having debated at some length the national and international aspects of marine resources policy, there was an articulation by the Government and Opposition of the Commonwealth's legislative capability in this policy area. Notwithstanding the wishes of many members to expand Commonwealth legislative capabilities, the Continental Shelf Convention was clearly considered inadequate as an instrument by which this could confidently be achieved²⁰ –

That Convention permitted a country to make a claim to the living resources on the sea bed out to a depth of 200 metres or to the limit of exploitability. At that time—1958—it was thought that 200 metres was about the limit to which you were ever likely to be able to exploit but as things have turned out the depth is somewhat greater now. In California exploration is going on at 1,500 feet ... This is the technical advance, and international law is attempting to keep pace with it.²¹

The frustrations shared by parliamentarians on both sides of politics in relation to international law of the sea likely accounts for the Commonwealth's growing interest in advancing UNCLOS III negotiations. Because the Coalition and Labor alike were exasperated by the imprecision of international law it is not surprising that a commonality developed in Law of the Sea policy—alluded to earlier—which has continued unchanged between subsequent Commonwealth governments.²² In other words, governments of both persuasions came to appreciate the existence of genuine Commonwealth interests in offshore resources. This same policy was emulated in the

²⁰ *Hansard*, House of Representatives, 28 November 1968, pp 3420, 3424.

²¹ *Hansard*, House of Representatives, 28 November 1968, p 3434.

²² See, generally: A. Bergin, "Australia Adopts New Maritime Zones" (1992) 7 *International Journal of Estuarine and Coastal Law* 123-128; H. Burmester, "Australia and the Law of the Sea - The Protection and Preservation of the Marine Environment", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 439-455; K. Suter, *The History of the Development of the Law of the Sea - the Importance for Global Marine Conservation and Recommendations for Australian Action* (World Wildlife Fund for Nature Australia/Humane Society International, Sydney, 1994).

bureaucracy but the input of different agencies and the oversight of several influential ministers meant that there were nonetheless emphases in policy priorities as between governments [more later].

A final observation needs to be about debate on the CSLNR Act. Unlike the passage through Parliament of the previous marine resources legislation this bill incited no discussion about the respective jurisdictional responsibilities of the Commonwealth and the states. Other than a brief reference to the Commonwealth's overtures to the states to enact uniform legislation for controlling sedentary fishing, the Parliamentary record is devoid of any deliberations as to the proper allocation of offshore jurisdiction.²³

Parliament's disinterest in this aspect of the bill is readily explained by the fact that sedentary fishing was limited to northern Australian waters, adjacent to states with little economic or demographic influence on the Commonwealth.²⁴ The particular curiosity worth highlighting is the silence of representatives as to the Commonwealth's power to legislate with respect to the continental shelf, especially following the endless argumentation on this very subject less than one year earlier in the context of the P(SL)A. It is difficult not to conclude that the CSLNR bill illuminates the disingenuity of the arguments presented in 1967 atesting to profound constitutional uncertainties over offshore jurisdiction. Regardless of these observations, the CSLNR Act had the effect of nurturing Parliamentary interest in offshore petroleum in the wake of the protracted P(SL)A debates, and thereby consolidating Commonwealth claims over the continental shelf.

²³ *Hansard*, House of Representatives, 28 November 1968, p 3421.

²⁴ In his monograph on minerals and petroleum policy—discussed further in the analysis of Commonwealth policy under Whitlam—Stevenson demonstrates how the presence of organised political or other advocacies profoundly shapes the nature of governmental responses to resource allocation. Stevenson, *op cit* fn 2.

3.1.2 Bonser v LaMacchia (1969)

The second fisheries policy development to influence the evolution of the P(SL)A was the prerogative of neither Parliament or the executive, but was the High Court decision in the case *Bonser v LaMacchia*.²⁵ This case reopened temporarily abeyed concerns over offshore jurisdiction, and was pivotal in Gorton's aborted legislative attempt and Whitlam's more succesful *Seas and Submerged Lands Act*.²⁶ The facts of this case were simple enough—LaMacchia was prosecuted for fishing six miles off the New South Wales coast with nets prohibited by regulations under the *Fisheries Act* 1952 (Cth). The prosecution was challenged on two constitutional grounds. Firstly, it was claimed that Commonwealth legislative power was limited to regulating fishing only with three miles of the coast, which was argued to be the limits of 'Australian waters beyond territorial waters' within the meaning of the Constitution.²⁷ The alternative argument held that if Commonwealth powers do apply to waters beyond three miles, Australian waters do not extend as far seaward as the outer limits proclaimed pursuant to the *Fisheries Act* 1952 (Cth). Because the case revolved around constitutional interpretation it was removed to the High Court.

All six judges hearing the case found that the *Fisheries Act* 1952 (Cth)—expressed to operate only seaward of the three mile limit—was a valid Commonwealth statute supported by s. 51(x) of the Constitution. LaMacchia was in turn guilty of committing an offence against the Commonwealth. In deciding the case, the court found that it was not necessary to define the outer extent of Australian waters, but determined simply that a point six miles offshore was within the area to which the *Fisheries Act* applied.²⁸ A fact which has been widely reported, however, is that two justices took the

²⁵ *Bonser v LaMacchia* (1969) 122 CLR 177.

²⁶ Rothwell and Haward, op cit fn 5.

²⁷ Australian Constitution s 51(x).

²⁸ *Bonser v LaMacchia* (1969) 122 CLR 177.

opportunity to contemplate at some length theories of jurisdiction over the offshore.²⁹ Indeed, the Chief Justice commented that it was not possible to settle the case without so doing, a statement which Cullen found "a most doubtful assertion."³⁰ O'Connell's estimation of the judges' method is more charitable, and proved to be highly prescient in foreseeing future events –

Two judges ... devoted themselves to enquiring whether "beyond territorial limits" means beyond the low-water mark or beyond the three-mile limit. In doing so they stirred up one of Australia's great constitutional issues, which has ramifications not only in the fisheries field but in the field of mineral exploration and in other fields as well. Undoubtedly their judgements will provoke a litigious serial in constitutional law, the end result of which is difficult to predict.³¹

In abbreviated terms, the decision strongly established that the offshore legislative capabilities historically resident in the Empire had accrued to the Commonwealth around 1900. Chief Justice Barwick formed the view that the area referred to in s. 51(x) of the Constitution—Australian waters beyond territorial limits—accrued to the Imperial Crown at an indeterminate date and this area was subsequently conveyed to the Commonwealth upon federation. These limits were distinguished from those of both the Commonwealth or states, the latter of which were bounded by the geographical low water mark. Therefore, the policy embodied in the *Fisheries Act*, that the states had a territorial sea, was misconceived. Barwick was concurred in this view by at least one other justice [Windeyer].³²

From this overview of *Bonser v LaMacchia* it is apparent that the High Court's judgement largely contradicted the policy embodied in the *Petroleum (Submerged Lands) Acts*. Accepting the views of Barwick and Windeyer, in particular, precludes the possible accrual of the territorial sea to the states

²⁹ D. O'Connell, "The Commonwealth Fisheries Power and *Bonser v. La Macchia*" (1970) 3 *Adelaide Law Review* 500-507; J. Waugh, *Australian Fisheries Law* (Intergovernmental Relations in Victoria Program, The University of Melbourne, Melbourne, 1988).

³⁰ Cullen, *op cit* fn 3 p 85.

³¹ O'Connell, *op cit* fn 29 p 501.

³² *Bonser v LaMacchia* (1969) 122 CLR 177.

upon federation, and certainly extinguishes the antecedent notion that the colonies exercised jurisdiction over these waters.³³ Moreover, the expansive judgements considered that the operation of Commonwealth legislation in areas beyond three miles was only a partial exercise of a more potent power to legislate.

Notwithstanding the apparent finality of *Bonser v LaMacchia*, O'Connell concluded that the states did have some extra-territorial powers to legislate with respect to offshore areas.³⁴ Waugh also interpreted the judgements as adverting neither a majority nor a unity determination of s. 51(x), despite confirming Commonwealth offshore powers.³⁵ The states' suppressed or residual capabilities were eventually resuscitated in 1980 following the inter-governmental tension of the early 1970s. At that earlier time, however, *Bonser v LaMacchia* served to compound the additive influences on the Commonwealth to exercise its legislative powers over the offshore, beginning with the Gorton bill in the following year.³⁶

3.2 PETROLEUM POLICY DEVELOPMENTS

This section discusses two developments in offshore petroleum policy which occurred in the early 1970s. Firstly, the Senate Select Committee established in 1967 in response to the P(SL)A reported during this time. Although the Committee commented positively upon the legislative scheme it made a number of critical recommendations relating to the need to clarify offshore jurisdiction. The so-called Gorton bill—the second related event—was presented to Parliament in 1970 where it was opposed by the states and the

³³ O'Connell, op cit fn 29.

³⁴ Ibid.

³⁵ Waugh, op cit fn 29.

³⁶ M. Haward, *Federalism and the Australian Offshore Constitutional Settlement* (University of Tasmania, PhD thesis, 1992) pp 119-131; B. Opeskin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395-431.

Federal Liberal Party. Gorton attempted to reduce the federal emphasis of the party, and the *Territorial Sea and Continental Shelf* legislation was the offshore plank of this policy. The report of the Senate committee is discussed first below before its relationship to Gorton's offshore policy is described in greater detail following.

3.2.1 Senate Select Committee on Off-shore Petroleum Resources

It is recalled from Chapter Two that in agreement to pass the *Petroleum (Submerged Lands) Act* the Senate established a Select Committee to examine the jurisdictional basis of the Australian Petroleum Settlement, as well as the details of regime created thereby.³⁷ There were eight terms of reference framing the Committee's inquiry many of which are apposite to every phase of the P(SL)A's evolution –

- (a) whether the constitutional conception underlying the legislation is consistent with the proper constitutional responsibilities of the Commonwealth and the States;
- (b) whether the system of administration established by the legislation is the most effective to fulfil the purpose of adequate utilisation of Australia's off-shore resources of oil and natural gas;
- (c) whether the legislation makes adequate provision for free interstate trade in gas and oil;
- (d) whether proper provision is made in the legislation for adequate royalties used in the national interest;
- (e) whether the areas of permits confirmed or authorised in the legislation are excessive;
- (f) whether proper provision is made relating to renewals to prevent stagnating oil exploration;
- (g) whether the legislation makes adequate provision for Australian ownership and/or control or Australian participation in the ownership and/or control of Australia's off-shore resources of oil and natural gas; and
- (h) the provisions of the legislation generally.

³⁷ *Hansard*, Senate, 8 November 1967, p 2189.

The Committee delivered its voluminous 800 page report to Parliament in December 1971, four years after being originally constituted.³⁸ An interim report addressing the first term of reference had been issued a year earlier in response to the Gorton Bill, discussed further below.³⁹ Generally, the Committee accepted the ingenuous nature of the 1967 Australian Petroleum Settlement and the effort expended to overcome constitutional hurdles. In particular, the P(SL)A was considered not to be inconsistent with the offshore roles of the Commonwealth and states because the avoidance of litigation left this situation unresolved.

A number of criticisms were directed at the Commonwealth government for its policy approach towards the 1967 Settlement, however. Firstly, the Committee reported that the constitutional conception underlying the legislation was inconsistent with what should be the proper relationship between Parliament and the executive. The manner in which the bills had been presented to Parliament for endorsement as a *fait accompli* in the context of the national Settlement was also criticized. Perhaps most importantly, the Committee noted that "the larger national interest is not served by leaving unresolved and uncertain" the allocation of jurisdiction as between the two spheres of government.

In its report the Senate Select Committee lavished obvious attention upon broad constitutional questions. The Committee did importantly contemplate the nature of the designated authority created under the Commonwealth's P(SL)A. Chapter Two described how through this mechanism state governments administered the Commonwealth statute on the latter's behalf, and made all the exploration and production decisions available thereunder. The Committee expressed disquiet at this approach because it inappropriately

³⁸ Hansard, Senate, 8 December 1971, pp 2496-8.

³⁹ Hansard, Senate, 24 September 1970, pp 877-879.

removed from the Parliament any ultimate oversight of action authorised under a law of the Commonwealth –

The Commonwealth Act is an Act which imposes responsibilities upon a Commonwealth Minister. But the responsibility of the Commonwealth Minister is limited to those decisions which, under the agreement between the Commonwealth and the States, are matters of Commonwealth responsibility. But many of the decisions which are made under the legislation are matters of State responsibility in respect of which the decisions are made by a State Minister who also is a Commonwealth functionary. In respect of those decisions there is no accountability to the Commonwealth Parliament.⁴⁰

Although this criticism was eventually negated—in part at least—by the Commonwealth amending the P(SL)A during the 1980s to assume this responsibility for itself, the confusion created by the designated authority compounded under the Whitlam Government. Part 3.3 describes how the *Seas and Submerged Lands Act* decisively removed the continental shelf to the jurisdiction of the Commonwealth, but had the undesirable effect of leaving decision making in respect of this area solely a state responsibility.⁴¹ Even to this day the constitutionality of this particular intergovernmental arrangement has yet to be determined by the High Court.

It is also necessary to introduce a parallel development occurring in relation to the Great Barrier Reef. As early as 1968, the Labor Opposition insisted that the Commonwealth should take unilateral action to protect the Reef against increasing foreign fishing, by usurping Queensland's assumed jurisdiction over the region.⁴² At the time the Commonwealth was unmoved despite its increased legislative interest in fisheries policy, described above. Several years later the Commonwealth and Queensland were entering into a stalemate over oil drilling on the Reef.⁴³ The latter was clearly of the view

⁴⁰ *Hansard*, Senate, 24 September 1970, p 879.

⁴¹ Hildreth, *op cit* fn 3.

⁴² *Hansard*, House of Representatives, 15 August 1968, p 227.

⁴³ *Hansard*, Senate, 8 December 1971, p 2505.

that the Reef was the property of the state while the Commonwealth was concerned at the possibility of environmental degradation. This conflict in turn contributed to the Commonwealth's attempt to enact the *Territorial Sea and Continental Shelf Bill* and assume jurisdiction over the offshore.⁴⁴

As a result of the impasse between the two governments, a Royal Commission was established to investigate the problem, reporting finally in 1976. The Royal Commission therefore overlapped the long awaited Senate Select Committee report, and concurred in recommending that offshore petroleum development be prohibited in the Reef.⁴⁵ As is described below, under Whitlam's Prime Ministership the Commonwealth finally legislated to wrest control of the Great Barrier Reef from Queensland in 1975. Chapter Four following shows that so accustomed to controlling the Reef had the federal government become by 1980 that the OCS preserved this offshore area to the jurisdiction of the Commonwealth.

In the event, the actions of Gorton to assert Commonwealth jurisdiction offshore overshadowed the Committee's work.⁴⁶ By introducing the *Territorial Sea and Continental Shelf Bill* to Parliament many of the recommendations contained in the report were addressed by default rather than by informed deliberation. Despite its potential for shaping the evolution of the P(SL)A the Committee's report unfortunately languished, and failed to influence Parliamentary debate on the draft legislation. As Reid acknowledges –

Given the almost non-existent public debate which accompanied this new legislation, it is not surprising that this report has not received the current attention it deserves.⁴⁷

⁴⁴ R. Kenchington, *Managing Marine Environments* (Taylor & Francis, New York, 1990).

⁴⁵ *Report of the Senate Select Committee on Off-shore Petroleum Resources*, p 36.

⁴⁶ Cullen, *op cit* fn 3 p 75.

⁴⁷ P. Reid, "Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone of Millstone?" (1980) 2 *Australian Mining and Petroleum Law Journal* 58-76.

3.2.2 The Gorton Bill (1970)

The Coalition Government in 1970 introduced to Parliament the *Territorial Sea and Continental Shelf Bill* to assert the exclusive right of the Commonwealth in respect of all offshore areas, with the exception of internal waters as existed at federation.⁴⁸ The bill was designed to provoke a state challenge in the High Court in order to finally answer questions of offshore jurisdiction, building upon the decision in *Bonser v LaMacchia*—the same tactic employed by the Labor Government three years later after the first bill's eventual failure. The second reading speech captures the elements of the *Territorial Sea and Continental Shelf Bill* –

In these circumstances, the Government feels that, without prejudice to the petroleum agreement and to the action that has been taken in pursuance of it, the constitutional issue should now be decided once and for all, and without delay. Until it is so decided, the Commonwealth cannot either disclaim responsibility for what is done in off-shore areas or itself take appropriate action. The Bill asserts what the Government believes to be the rights of the Commonwealth, broadly in accordance with the judicial views I have mentioned. If the States are not prepared to accept as definitive the judgments of the Chief Justice of Australia and Mr Justice Windeyer in *Bonser v. La Macchia*, it is their right to commence proceedings which will raise squarely for decision by the full High Court any issues they wish to contest.⁴⁹

Despite its provocative tenor, the Gorton Bill—as the draft legislation became known—was not conceived to displace the role of state governments in offshore petroleum policy, as the second reading speech indicates. As originally proposed, the legislation would allow the 1967 petroleum arrangements to continue while a companion bill enabling Commonwealth exploitation of submerged minerals would be enacted.⁵⁰ Offshore minerals policy would thus become the province of the Commonwealth while the petroleum regime would continue unchanged.⁵¹ Indeed, it was hoped that

⁴⁸ *Hansard*, House of Representatives [Reginald Swartz, Minister for National Development], 16 April 1970, p 1276.

⁴⁹ *Hansard*, House of Representatives, 16 April 1970, p 1280.

⁵⁰ *Hansard*, House of Representatives, 16 April 1970, p 1277.

⁵¹ *Hansard*, House of Representatives, 16 April 1970, p 1282.

the administrative functions of the states with respect to the P(SL)A could be extended to the proposed minerals regime –

We would hope that the States would be willing to administer the area beyond 3 miles from low water mark on behalf of the Commonwealth and that this administration might run concurrently with identical State legislation operating in the area from low water mark to the 3 mile limit. The competence and expertise of the State Mines Departments and their officers would be of considerable help in this matter.⁵²

The Gorton Bill would also not interfere with the international dimensions of offshore jurisdiction, but was designed to address only its domestic dimensions.⁵³ The implication of the *Territorial Sea and Continental Shelf Bill* was that henceforth state legislative powers over the offshore must be read subject by reason of s 109 of the Constitution to the paramount force of Commonwealth law. Clause 13 of the bill did not of itself exclude the operation of existing laws—such as the P(SL)A—which would need to be amended on a statute-specific basis.

A month after the draft legislation was tabled it was stalled in Parliament, and Prime Minister Gorton was besieged by forces within and without his party. Haward observes that hostility to the Gorton Bill was two-dimensional. The most visible tension over the bill's policy was felt vertically between the Commonwealth and the states. As occurred previously in the context of the Australian Petroleum Settlement, Liberal coalition states joined with those under Labor governments in condemning the draft legislation.

Horizontal tensions were also experienced within the federal parliamentary party, which was sensitive to the states and took umbrage at the Gorton Bill. Equally, many members of the federal Liberal Party had an endemic personal dislike of Gorton. In the words of one of his loyal

⁵² *Hansard*, House of Representatives [Nigel Bowen, Minister for Education and Science], 15 May 1970, p 2250.

⁵³ *Hansard*, House of Representatives, 16 April 1970, p 1278.

ministers, the *Territorial Sea and Continental Shelf Bill* "provided ammunition to those waiting to get rid of John Gorton."⁵⁴ Personal relations amongst the most senior politicians therefore appears again as an influential factor in shaping legislative policy. As was seen in 1967, the intervention of the Premier of Victoria ensured that the Settlement would be very favourable to that state. During the next phase the personal actions of the Commonwealth Minister for Minerals and Energy inflamed the already tense inter-governmental and industrial relations of the Whitlam Government.⁵⁵

As a result of these considerable influences on the fate of the Gorton Bill, an irreparable rift soon grew between the Prime Minister—who favoured abandoning the heavy federalist emphasis of the government—and both the parliamentary party and state governments. So hostile, in fact, was the Liberal Party to Gorton's vision with respect to the offshore that his demise as Prime Minister is attributed to the *Territorial Sea and Continental Shelf Bill*.⁵⁶ The Labor Opposition originally supported the Prime Minister's approach, having consistently clamoured for a clear assertion of Commonwealth jurisdiction over the offshore for twenty years. In the face of a backbench revolt over the bill, however, Gorton was left isolated and only narrowly survived a motion of censure against him moved by Labor.⁵⁷ Rothwell and Haward succinctly express the problem thus –

⁵⁴ Haward, op cit fn 36 p 126.

⁵⁵ In his chronology of jurisdiction in the United States, Wilder documents the influence of one particular Interior Secretary, Harold Ickes, on the resolution of inter-governmental tension over the territorial sea. See, R. Wilder, "Is This Holistic Ecology or Just Muddling Through? The Theory and Practice of Marine Policy" (1993) 21 *Coastal Management* 209-224.

⁵⁶ Cullen, op cit fn 3 p 75; Haward op cit fn 36 pp 123-127.

⁵⁷ *Hansard*, House of Representatives, 15 May 1970, p 2327. The Labor opposition's hypocrisy on the subject of the *Territorial Sea and Continental Shelf Bill* was not lost on parliamentarians. Despite its support for this legislation the opposition moved to censure the Prime Minister rather than enact the bill and thereby achieve Commonwealth jurisdiction over the offshore. As one Government member remarked in voting down the censure motion: "The Opposition, as a matter of tactics, has moved a motion of censure and has been loud in its demand for State rights. But everybody in this House knows that the Federal policy of the Labor Party is to wipe out State parliaments and to put all power in the hands of the Federal Parliament. Therefore, it is almost a comedy to hear members of the Labor Party standing up and supporting State rights. If this vote of censure were carried,

The appointment of a new Prime Minister saw the Commonwealth government introduce legislation in 1970 which asserted Commonwealth sovereignty offshore from the low water mark. This bill was withdrawn in the face of considerable opposition from within the government party room and from State governments. It was, however, an indicator of a substantial challenge to the relatively congenial arrangements established under the 1967 Petroleum Agreement.⁵⁸

It is not unsurprising that the Gorton Bill had such a fateful reception. Although the draft legislation did not seek to immediately undo the Australian Petroleum Settlement it was nonetheless a portent of shifts in this direction, and was appropriately termed “creeping centralism” during Parliamentary debates.⁵⁹ It was the procedure by which federalism was being eroded, rather than the erosion *per se*, that derailed Gorton and his bill. The particular point of order stemmed around the Commonwealth’s pledge to inform states of impending offshore legislation so that the latter may input to revisions of the Settlement; that is, the Commonwealth was held by Parliament to honour the 1967 Agreement.⁶⁰

Parliament’s concern over this procedural problem—more so than the veracity of the Gorton Bill—is amply evidenced in Parliamentary debate –

The same authoritarian, arrogant Prime Minister who was capable of doing that moved in again. He said: ‘I, Gorton, will provide a Gordian solution. I will provide the solution. We will go right ahead. We have a judgment (*Bonser v. LaMacchia*). To hell with the States. Let them rot. We will assert to the full our sovereign rights’. The Commonwealth has those rights. I said this in the House when the off-shore oil legislation was being discussed some 3 years ago, in 1967. The Commonwealth undoubtedly has these rights. I am not dealing with the merits of the legislation; I am dealing with the facts as they are. They are quite simple.⁶¹

it might well lead to a further erosion of State powers.” House of Representatives, 15 May, 1970 p 2273.

⁵⁸ Rothwell and Haward, *op cit* fn 5 p 35.

⁵⁹ *Hansard*, House of Representatives, 15 May 1970, p 2273.

⁶⁰ *Hansard*, House of Representatives, 15 May 1970, pp 2250-1, 2325-7.

⁶¹ *Hansard*, House of Representatives [Wilfred Hughes], 15 May 1970, p 2273.

In spite of its failure to receive the endorsement of Parliament, the Gorton Bill nonetheless made several important contributions to the development of Commonwealth marine resources policy. Firstly, it signified a substantial move by the Commonwealth to assert its jurisdiction over offshore areas through legislation. That this was done in defiance of state wishes enhances the significance of the draft legislation. The Gorton Bill also represents the beginnings of a bipartisan policy towards the offshore. Although the Liberal Party revolted against the *Territorial Sea and Continental Shelf Bill*, Gorton's successor to the Prime Ministership, William McMahon, retained the bill on the Parliamentary agenda rather than withdrawing it completely, an action which evidences an enduring change in offshore policy within the Liberal coalition government.⁶²

A third contribution to legislative policy prompted by the Gorton Bill is observed in the avenue that the states elected to follow to negate the Commonwealth's policy shift. Rather than simply resorting to the courts to seek redress state governments were aware of their considerable expertise in offshore petroleum development and how this could be used in interacting with the Commonwealth. As Stevenson describes the situation –

Only limited use was made of the judicial process as a means of resisting federal initiatives. When the *Territorial Sea and Continental Shelf Bill* was introduced in 1970, Tasmania, Queensland and Western Australia supported the idea of challenging it before the High Court, while Victoria and South Australia inclined to the view that any attempted federal takeover could more effectively be frustrated by withholding administrative co-operation. As it turned out, the shelving of the bill and the overthrow of Mr Gorton by the Liberal caucus made it unnecessary to do either.⁶³

⁶² Haward, op cit fn 36 pp 127-131. A similar dichotomy in policy and practice is also seen in the next chapter. The Fraser Liberal government, which succeeded Whitlam's centralism by advancing an ostensible federalist offshore policy, capitalized upon the expansion in Commonwealth functions emplaced by the latter without ever returning to the pre-existing state of marine affairs. M. Haward and G. Smith, "What's New About the 'New Federalism'?" (1992) 27 *Australian Journal of Political Science* 39-51.

⁶³ Stevenson, op cit fn 2 p 69.

Another two years passed before the draft legislation was again before Parliament. Hansard debates reveal the states' latent anxiety at the prospect of a judicial determination of offshore powers through a test case of the *Territorial Sea and Continental Shelf Bill*.⁶⁴ During this period an uneasy truce prevailed between Prime Minister McMahon and the Premiers. On the one hand the Commonwealth was persuaded by a united state position not to proceed with the bill and thereby risk a breakdown in offshore arrangements; the states, however, were discomfited by the bill remaining on the Parliamentary notice paper.⁶⁵ In the event, Parliament was prorogued for the 1972 federal election without the bill being passed into law.

In a twist of irony that didn't escape at least one author, the Senate Select Committee delivered its report into the 1967 Settlement—with its recommendations to resolve offshore jurisdictional responsibilities—at the same time as Gorton was being removed as Prime Minister.⁶⁶ It was because of this untimely sequence of events that the report failed to influence offshore petroleum policy in a manner befitting its potentiality.⁶⁷ With the semblance of a Commonwealth offshore petroleum policy beginning to appear, it would only take the right political circumstances for the intention of the original *Territorial Sea and Continental Shelf Bill* to be realized in legislation.

3.3 COMMONWEALTH RESOURCES POLICY UNDER THE WHITLAM GOVERNMENT

3.3.1 Introduction to the Whitlam Commonwealth

The Whitlam Government was elected to office in 1972, capitalizing on the ill-fated Gorton Bill “which almost dismembered the then governing

⁶⁴ *Hansard*, House of Representatives, 18 October 1972, p 2770.

⁶⁵ Haward, op cit fn 36 pp 127-131.

⁶⁶ *Ibid*, pp 150-153.

⁶⁷ Reid, op cit fn 47.

Coalition".⁶⁸ At this time, a variety of influences external to Australia was combining to motivate the Commonwealth to more actively intervene in domestic resources policy. These events included the growth of Japan as a seemingly inexhaustable market for Australian minerals, and the success of OPEC in raising oil prices, leading to the ensuing 'energy crisis'. Because these resource industries expanded so rapidly in Australia—almost dependent upon foreign markets and capital—it became apparent that foreign interests were deriving an unduly large share of benefits through high profits and low costs.⁶⁹

In terms of marine resources policy, Whitlam's particular infamy was to enact the *Seas and Submerged Lands Act* and deprive the states of their claims over offshore waters and seabed resources. Whilst the empiricism of this event is very well documented and beyond dispute, a common deficiency of analyses is their failure to give adequate cognition to the context in which the statute was enacted.⁷⁰ By overviewing the Whitlam Government's approach to federalism it is possible to inject a basis to Commonwealth legislative policy that is typically missing from discussions of the *Seas and Submerged Lands Act*, and to thereby understand the statute as a policy instrument of broad offshore application beyond the control of petroleum resources.

The most important feature of Whitlam's Prime Ministership was the distinctive blend of nationalism it brought to Commonwealth policy making. Unlike earlier Labor governments that had long sought the abolition of the states, Whitlam departed from this philosophy by accepting the role of sub-

⁶⁸ Ibid, p 61.

⁶⁹ Stevenson, op cit fn 2.

⁷⁰ Crommelin, op cit fn 3; R. Cullen, "Canada and Australia: A Federal Parting of the Ways" (1989) 18 *Federal Law Review* 68-83; Cullen, op cit fn 3 pp 86-90; R. Lumb, "Australian Coastal Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 370-389.

national governments and concentrating instead on implementing Commonwealth policies within the constraints of the federation.⁷¹ One mechanism employed by the Commonwealth to advance its policies within the states was the expanded use of grants under s. 96 of the Constitution.⁷²

Whitlam's modified nationalism is described by Galligan –

Whitlam was instrumental in changing the Labor Party's old hard-line abolitionist stance, but remained at heart a rational centralist. His 'new federalism' was a heady mixture of Labor's traditional preference for national policy-making plus a humane concern for improving the quality of life in needy local and regional areas through targeting federal money for programmes designed in Canberra.⁷³

A parallel strategy of the Whitlam Government was to rely heavily on its constitutional powers to enshrine Commonwealth policies in legislation. It was this approach which most aroused state government objections, especially where the Commonwealth sought to enter areas of policy that were traditionally the province of the states, such as minerals and petroleum.⁷⁴ As discussed in the following part, Whitlam's efforts to legislate in respect of these resources were fiercely resisted by the states, who were joined by organised industry interests in opposing Commonwealth legislative incursions into the resources policy field.

Notwithstanding the purposeful move by the Commonwealth into new areas of policy, Whitlam eschewed framing his Government's approach in centralism versus federalism terms. Instead, he promoted the need for

⁷¹ J. Warhurst, "Transitional Hero: Gough Whitlam and the Australian Labor Party" (1996) 31 *Australian Journal of Political Science* 243-252.

⁷² Section 96 of the Australian Constitution reads as follows - During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament sees fit. The disbursement of funds to state governments under this provision—known as special purpose grants—is now a common feature of Commonwealth policy.

⁷³ B. Galligan, "A Political Science Perspective", in B. Galligan (ed), *Australian Federalism* (Longman Cheshire, Melbourne, 1989) pp 45-68, p 49.

⁷⁴ Ibid; B. Head, "The Australian Political Economy: Introduction", in B. Head (ed), *State and Economy in Australia* (Oxford University Press, Melbourne, 1983) pp 3-21.

Commonwealth oversight in most policy areas to ensure that Australian interests and welfare were protected and enhanced nationally. In his own words –

It is a grotesque caricature to depict the program of the Australian Government in centralist terms ... It is true that these programs specified new initiatives and called for vigorous action by the national Government ... It should be equally recognised that these national initiatives and actions required cooperation with the States and the involvement of the States and local government. Action, reform, involvement by the national Government are not necessarily centralism.⁷⁵

The Prime Minister's conception of national policy-making comprised five identifiable elements, three of which are relevant to offshore resources policy and are usefully listed here. These are: the direct involvement of the federal government in financing and planning new functions, especially where national involvement was needed to achieve equality; Commonwealth willingness to accept responsibility for services which hitherto imposed burdens on the states; and continuing cooperative planning at the Ministerial and official level in areas where national and state responsibilities overlap.⁷⁶

It was in the details of these program elements that intergovernmental and industrial conflict arose, only to continue unabated for much of the Labor Government's terms. Whitlam considered operationalizing his new federalism to be "very much about an attempt to bring our federal system and our federal machinery up to date".⁷⁷ Updating the federation in this manner amounted to wholesale reform of Commonwealth/state relations, however, which very soon proved to be unsustainable. Indeed, it has been suggested that all Whitlam's attempts at procedural and structural reform failed, either

⁷⁵ E. Whitlam, "The New Federalism: A Review of Labor's Programs and Policies", in R. Mathews (ed), *Making Federalism Work - Towards a More Efficient, Equitable and Responsive Federal System* (The Centre for Research on Federal Financial Relations, Canberra, 1976) pp 1-13, p 3.

⁷⁶ Ibid.

⁷⁷ Ibid, p 11.

at the time or very soon after the change of government in December 1975.⁷⁸ The Commonwealth's reformist failures have been attributed to the inability of the governmental system to absorb readjustment on the scale attempted by Whitlam –

Since its election in 1972, the present Government has attempted to expand Federal roles both within areas generally agreed to be Federal responsibilities and into areas hitherto left to the States ...In so doing it has created new departments and authorities within its own administration, shuffled and re-shuffled existing departments, and attempted to build networks of regional institutions. Little of this has been done neatly or without conflict ...Moreover, different sections of the Government have developed different conceptions of the directions that should be followed ...Labor's activities in office have placed great strains on the policy-making and co-ordinating capacities of the machinery of government. The new bureaucratic growth has been poorly integrated with established institutions, and established institutions and practices have often had difficulty meeting the Government's demands.⁷⁹

The desire of Whitlam to enhance the Commonwealth's role in national policy and administration were frustrated by their ambition. Legal and political inertia partly accounts for this frustration, but the problem is also due to the confrontational and impatient style of the Labor Government.⁸⁰ Put simply, Whitlam's reforms were stalled by "the counter-veiling federal forces that his roughshod centralist approach aroused."⁸¹

3.3.2 Commonwealth resources policy and state/industry relations

The obstacles encountered by the Commonwealth in policy-making generally were amplified in the particular case of resources policy. The source of this additional resistance was the states' ownership of resources located within their boundaries, and the control over offshore petroleum granted by the 1967

⁷⁸ D. Jaensch, *The Hawke-Keating Hijack* (Allen & Unwin, Sydney, 1989).

⁷⁹ P. Weller and R. Smith, "Setting National Priorities: The Role of the Australian Government in Public Policy", in R. Mathew (ed), *Making Federalism Work - Towards a More Efficient, Equitable and Responsive Federal System* (The Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1976) pp 81-96, pp 83-84.

⁸⁰ Haward and Smith, op cit fn 62.

⁸¹ Galligan, op cit fn 73 p 49.

Settlement. The Labor Government failed to appreciate the extent to which it was compelled to rely upon the states for administering the offshore regime. As well, the strength of state bureaucratic links with the resources industry were underestimated by the Whitlam ministry.

3.3.2.1 *The state/industry alliance*

Prior to the Whitlam Government coming to power, relations between the mineral industries and the Commonwealth "insofar as they existed at all" were friendly but not intimate.⁸² The quality of this relationship deteriorated soon after the change of government as the Commonwealth insisted upon observing the referral mechanism contained in the Agreement—whereby the designated authority referred to the Commonwealth matters of national importance—which had been ignored for the several years of the Settlement's life.⁸³

Stevenson provides a detailed account of the interaction between Whitlam's resource minister, the Commonwealth and state mining bureaucracies, and the influential oil industry.⁸⁴ The Commonwealth resources minister—Rex Connor—was viewed as an extreme centralist who sought to maximise the Commonwealth's role in resources policy. Connor was also very disdainful of the close relationship between industry and the state governments. It was remarked that he "had a low opinion of the Australian Mining Industry Council (AMIC) and the Australian Petroleum Exploration Association (APEA), which previous governments had accepted as legitimate spokesmen for the mineral resource industries."⁸⁵ The

⁸² Stevenson, *op cit* fn 2 p 75.

⁸³ Cullen, *op cit* fn 1; R. Cullen, "The Encounter Between Natural Resources and Federalism in Canada and Australia" (1990) 24 *U.B.C. Law Review* 275-305; Hildreth, *op cit* fn 3.

⁸⁴ Stevenson, *op cit* fn 2.

⁸⁵ *Ibid*, p 77. The approach of the Whitlam Government towards industry is contrasted to the very workable relations between these two spheres ten years later under the Hawke Labor Government, when the minister worked tirelessly to rebuild Commonwealth/industry trust [Chapter Five].

uneasiness of these relations is observed by Stevenson in the particular case of pioneering development on the north-west shelf –

The state government, whether Labor or non-Labor, shared with Woodside-Burmah the common objectives of beginning production as soon as possible ... Because of these common objectives, the firm and the state as 'designated authority' under the 1967 agreement enjoyed a harmonious relationship. This very fact, in the eyes of Connor and other federal Labor politicians, seemed to confirm their suspicion that state governments, regardless of party affiliation, could not be trusted to stand up to 'the multinationals'.⁸⁶

Perhaps the lowest point in Commonwealth/state resources relations was Connor's refusal to convene any meetings of the Australian Minerals Council while he was minister. The Council was the peak intergovernmental body comprising all Australian resource ministers, established immediately following the 1967 Settlement with a view to coordinating policy between governments. Such was his distrust of the state/industry nexus that Connor discontinued meetings of the Council during his ministerial term, despite overtures from the states that he use this mechanism for intergovernmental dialogue.⁸⁷

Ill-feeling between the two spheres of government was mirrored at the bureaucratic level. Connor's newly created department responsible for administering the Commonwealth's P(SL)A resented the role of the states in offshore petroleum development, an attitude that had simmered since the 1967 Agreement was reached [observed earlier in Chapter Two]. Perhaps the cause of this resentment was recalcitrance on the part of the Commonwealth bureaucracy that its relationship with the states was one of necessity. The timeliness of political conflict therefore provided the opportunity for latent

⁸⁶ Ibid, p 41. The north west shelf of Western Australia was emerging in the early 1970s as the second highly prospective area after Victoria's Bass Strait, and soon outpaced the latter as the country's primary hydrocarbon-producing region. Later chapters will show how the productivity of the north west shelf secured the state of Western Australia special concessions under the OCS, which were subsequently eroded by the Commonwealth under Labor governments in the 1980s.

⁸⁷ Ibid.

differences between the Commonwealth and state agencies to be exacerbated, thus ensuring a breakdown in the P(SL)A regime even before the question of offshore jurisdiction was challenged by the *Seas and Submerged Lands Act*. The interplay of these several influences is captured precisely by Stevenson –

In addition, many of the civil servants who comprised the Department of Minerals and Energy under the Labor government had been transferred from other departments, such as Trade and Industry, where there had been little need to take state governments into consideration. Thus both politicians and bureaucrats tended to ignore the states and to consult them as little as possible ... Even without attitudes such as this on the part of federal politicians and civil servants, the increasing involvement of the federal government in mineral resource policy would have led to conflict with the states. It would have done so because any intrusion by the federal government into an area of policy that had previously been left almost entirely to the states was bound to be regarded by the state governments as a threat to their power.⁸⁸

3.3.2.2 *The Petroleum and Minerals Authority*

A number of authors discuss the role of the Petroleum and Minerals Authority as the key instrument through which the Whitlam Government sought to intensify the Commonwealth's interests in resources policy.⁸⁹ The Authority was established for two main purposes: to enter into commercial arrangements to explore for and produce minerals and petroleum on behalf of the Commonwealth; and to assist in implementing the Whitlam Government's policy of a higher Australian ownership of natural resource industries. To this end, the enabling legislation, the *Petroleum and Minerals Authority Bill*, was expressed so as to maximize the scope of Commonwealth legislative powers with respect to natural resources policy.⁹⁰ The motivation

⁸⁸ Ibid, pp 29-30.

⁸⁹ Haward, op cit fn 36 pp 145-147; M. Hunt, "Government Policy and Legislation Regarding Mineral and Petroleum Resources" (1988) 62 *The Australian Law Journal* 841-862; Reid, op cit fn 47; Stevenson, op cit fn 2.

⁹⁰ The Petroleum and Minerals Authority was empowered to exercise its functions in a federal territory, on the continental shelf or under the territorial sea, elsewhere in Australia so as to facilitate trade and commerce, and to ensure the supply of petroleum and minerals for defence. Each of these functions corresponds with an enumerated constitutional head of power [refer Chapter One].

behind the legislation is amply seen in Connor's second reading speech, wherein he referred to the circumstances of the 1967 Settlement –

It was the policy of our predecessors to make their contribution to the search for and development of our petroleum resources by a variety of indirect means including payment of subsidies and special tax arrangements, and to accept the abuses necessarily associated with such a system ... The great difference between them and us was their policies, which exposed Australian initiatives to overseas acquisition and control. We believe this policy resulted from a misunderstanding of the national interest, ignorance of the effects of internationalisation, neglect of the real needs of the Australian community, under-confidence in the capacity of their fellow Australians, and fear of the consequence of failure.⁹¹

Australian resources history shows that there had never been any serious deliberation given to the idea of a Crown body to exploit and develop resources.⁹² The governmental role was to provide incentives and to oversee and regulate commercial activities on the assumption that development was the province of private enterprises. The concept of a Commonwealth resources authority was therefore anathema to an influential coalition of industry, state governments and the Liberal Opposition. The latter two considered the proposed authority as a derogation of private interests in mineral and petroleum development, while industry was ideologically opposed to the creation of a national body for engaging in the commercial development of resources.⁹³ This collection of opponents ensured that the draft legislation would be received by Parliament with misgivings, and was in turn instrumental in its ultimate demise.

The circuitous journey of the *Petroleum and Minerals Authority Bill* through Parliament in 1973/4 and into the High Court is described by Haward.⁹⁴ After its introduction into the Senate in December 1973, the bill

⁹¹ *Hansard*, Senate, 4 December 1973, pp 4245-6.

⁹² R. Herr and B. Davis, "The Impact of UNCLOS III on Australian Federalism" (1986) 41 *International Journal* 674-693.

⁹³ Head, *op cit* fn 74.

⁹⁴ Haward, *op cit* fn 36 pp 145-147.

was adjourned and then defeated in April 1974, whereafter which it was immediately reintroduced to the lower House. After being defeated a second time by the Senate the draft legislation became one of the triggers for the 1974 double dissolution election, and was one of the six bills passed during the historic joint sitting of Parliament.

Subsequent to its enactment, a High Court challenge by the states resulted in the legislation being invalidated because of constitutional constraints pertaining to Parliamentary double-dissolutions.⁹⁵ As will be described in the next part, this same tactic was unsuccessfully repeated in relation to the *Seas and Submerged Lands* because of this latter statute's solid constitutional foundation. That the *Petroleum and Minerals Authority* should incite such intense opposition reveals the depth of sentiment towards Commonwealth resources policy, especially when the legislation was being driven by a ministry insensitive to state government desires.⁹⁶

3.4 WHITLAM AND MARINE RESOURCES LEGISLATION

3.4.1 *Seas and Submerged Lands Act 1973 (Cth)*

As Chapter Two reveals, Whitlam and the Labor Opposition had railed against the Coalition Government's approach towards marine resources since enactment of the *Pearl Fisheries Act* in 1953. Upon assuming office in the 1972 federal election, Whitlam announced his intention to introduce

⁹⁵ Australian Constitution, s 57 requires that three months must elapse between a bill being rejected by one House of Parliament after having been passed by the other, before it may be reintroduced to the first House for a second reading. If the bill is twice rejected by the second House a trigger for a double dissolution election is then created, following which election the bill may be presented to a joint sitting of both Houses. In the case of the *Petroleum and Minerals Authority Bill*, the requisite three months duration had not been satisfied, and the legislation was therefore invalidly enacted by the Parliament.

⁹⁶ The Minister for Resources and Energy in the Howard Liberal Government many years later [Warwick Parer] was to note with some satisfaction that Commonwealth/industry relations under Whitlam had deteriorated to the extent that the Commonwealth was pointedly not invited to attend the 1974 APEA annual conference. See: Chapter Seven.

legislation, the *Seas and Submerged Lands Act*, to declare Commonwealth jurisdiction over the offshore. By enacting this legislation it was hoped to provoke a High Court challenge to clarify the festering question of offshore jurisdiction –

I congratulate the Minister for Minerals and Energy (Mr Connor) on the introduction of this Bill. It is much the same as what is termed the Gorton Bill—the Territorial Sea and Continental Shelf Bill. It was promised by the Prime Minister (Mr Whitlam) in his policy speech in 1972. It was mentioned in the Governor-General's address to the Parliament in 1973. It will allow the legal position as to sovereignty to be exercised by the States and the Commonwealth to be determined in the High Court. In fact, the Minister virtually said this in his second reading speech ... He said that because he knows full well, as he knows now, that you can never reach any finality with the States about it. They are opposed to it and the only way this matter can be determined is if it goes to the High Court.⁹⁷

When first presented as a bill, the *Seas and Submerged Lands Act* (SSLA) consisted of three parts. The first part contained the preambular and preliminary details, referring importantly to the 1958 UNCLOS conventions which were appended as schedules to the statute [more below]. Part Two addressed the core issues of offshore jurisdiction. Sovereign rights over continental shelf resources were declared by the SSLA vested in the Crown in right of the Commonwealth.⁹⁸ This provision meant that states were deprived of any claim to jurisdiction over the continental shelf. As suggested earlier, this component of the draft legislation was most predictable and assured of being held valid in the inevitable High Court case.

More disturbing to the states were those sections of the SSLA which dealt with the territorial sea.⁹⁹ Despite being formally recognised through inscription in s. 51 (x) of the Constitution, the three mile territorial sea had since federation existed as a vague product of customary law, jurisdiction

⁹⁷ *Hansard*, House of Representatives, 17 May 1973, pp 2319. Also, House of Representatives, 17 May 1973, pp 2338, 2341; Senate, 30 May 1973, pp 2063, 2074.

⁹⁸ *Seas and Submerged Lands Act*. 1973 (Cth) s 11.

⁹⁹ Cullen, *op cit* fn 3 pp 107-108, 222-223.

over which it was widely assumed had accrued to the states as a legacy of colonial antecedents. The territorial sea became legally codified in Australia by the SSLA, but exclusive sovereignty over this strip of water was vested in the Commonwealth rather than in the states.¹⁰⁰ This action ended state territory at the low water mark of the beach, shattering attitudes and practices in excess of what states might reasonably have expected on the basis of prevailing opinion.

In addition to the substantive provisions of the *Seas and Submerged Lands Act* it is important to also emphasise the declaratory nature of the statute. The theories behind declaratory and annexary assumption were canvassed in Chapter Two, where it was seen that the less assertive method of jurisdiction—statutory annexation—was adopted in the *Pearl Fisheries Act* 1953 (Cth). By contrast, the *Seas and Submerged Lands Act* employed the more provocative method of jurisdictional declaration, which contained the assumption that pre-existing rights held by the Commonwealth were being formally codified for the first time¹⁰¹ [a point returned to later in the discussion of the ensuing case, *New South Wales v the Commonwealth*]. Section 16 of the *Seas and Submerged Lands Act* 1973 (Cth) also saved the operation of state laws insofar as these didn't express any claim to offshore areas. The existence of this provision enabled states to continue to manage fisheries, for example.

The third part of the SSLA was an exclusive Commonwealth regime for governing the exploitation of non-hydrocarbon minerals from the low water mark to the edge of the continental shelf. As originally introduced to Parliament, the SSLA was to leave intact the regime created pursuant to the P(SL)A despite bringing the offshore under Commonwealth jurisdiction.¹⁰²

¹⁰⁰ *Seas and Submerged Lands Act*. 1973 (Cth) s 6.

¹⁰¹ Cullen, op cit fn 1.

¹⁰² *Hansard*, House of Representatives, 17 May 1973, p 2316.

Aside from the unusuality of this arrangements—described further in section 3.3.3 below—the state governments were doubtful of the Commonwealth's commitment not to alter the 1967 Settlement arrangements.¹⁰³ From Parliamentary debates it also appears that confusion prevailed in both Government and Opposition ranks as to the implications for offshore petroleum of the draft legislation.

Haward documents the Whitlam Government's haste in pushing the bill through Parliament as urgent legislation.¹⁰⁴ The bill was introduced and passed by the House of Representatives in only two sitting days in May, but not before the Coalition urged for a new offshore pact to be struck with the states, which were united in opposing the draft legislation.¹⁰⁵ It was in the Senate that the bill became delayed –

All the State Premiers are opposed to this legislation. They want to be consulted. They do not want to see arbitrary, unilateral action taken to deprive them of a lot of their powers ... One of the reasons why the Bill was not proceeded with previously was that all the States—not just one of them—objected at that time. This is a State House. In the final analysis, we represent the States.¹⁰⁶

Despite Whitlam's desire to settle the offshore jurisdictional problem, the winter Parliamentary recess held the draft legislation in abeyance. During the next session the Coalition agreed to support the bill with the deletion of Part III, the mining code for offshore minerals. Part of the reason for deleting this part was the concern that it would leave in utter confusion the status of offshore titles if the bill was not subsequently upheld in entirety.¹⁰⁷ It was also suggested that to exclude the states from the proposed offshore mining regime was illogical.¹⁰⁸

¹⁰³ *Hansard*, House of Representatives, 17 May 1973, pp 2328, 2333.

¹⁰⁴ Haward, *op cit* fn 36 pp 137-146.

¹⁰⁵ *Hansard*, House of Representatives, 17 May 1973, pp 2315, 2337, 2344.

¹⁰⁶ *Hansard*, Senate [Alexander Lawrie], 30 May 1973, p 2074.

¹⁰⁷ *Hansard*, House of Representatives, 17 May 1973, p 2305.

¹⁰⁸ *Hansard*, House of Representatives, 17 May 1973, pp 2318, 2339.

The draft legislation was therefore finally passed by the Senate without the offshore mining code. The Government in the lower house accepted the amendment and the *Seas and Submerged Lands Act* 1973 (Cth) became law in December. The deleted code for offshore mining was introduced as a separate bill to create a Commonwealth mining regime seaward of the low water mark. Unlike the *Seas and Submerged Lands Act*, the minerals bill twice failed to pass the Senate—on the grounds that the draft legislation should await the High Court challenge—and became one of the bills triggering the 1974 double-dissolution of Parliament, along with the *Petroleum and Minerals Authority Act*. Later chapters document how the petroleum and minerals regimes have converged in approach since the events of 1973 as a result of major changes in the marine policy framework.¹⁰⁹

As mentioned, the Commonwealth had advanced its legislation by placing Australian domestic jurisdiction within an international context. The *Seas and Submerged Lands Act* purported to be based upon the international treaties that dated from the first United Nations Conference on the Law of the Sea convened in 1958 to tackle the growing problem of extra-territorial maritime claims. The *Seas and Submerged Lands Act* was the instrument by which the Commonwealth, as national government, implemented these treaties in Australia by legislating pursuant to s. 51(xxix), the external affairs power. Although the Commonwealth has come to advance domestic policies by incurring international treaty obligations and appending these as schedules to statutes, the *Seas and Submerged Lands Act* 1973 (Cth) represents the first express use of this mechanism.

¹⁰⁹ A statute creating a regime for offshore minerals was enacted as part of the Offshore Constitutional Settlement in 1981, and updated in 1994 in response to the Law of the Sea Convention entering into force; more in Chapters Four and Five.

During the pre-Settlement period in 1966 Lumb canvassed the avenues by which the UNCLOS conventions could be given domestic effect.¹¹⁰ Three options were contemplated at that time—the promulgation of regulations by the executive, absorption of the conventions into legislation text, and the annexation of the treaties to enabling legislation. The lattermost of these options was dismissed by Lumb because it was untried as a legislative strategy. Seven years later, however, it was the mechanism preferred by Whitlam to declare Commonwealth jurisdiction.¹¹¹ As discussed in section 3.3.4, the nexus between Law of the Sea and Commonwealth legislation was strengthened by Whitlam in his efforts to emplace a national marine resources policy.

3.4.2 The petroleum legislation after the *Seas and Submerged Lands Act*

Insofar as petroleum development was concerned, the effect of the *Seas and Submerged Lands Act* was to render invalid the state legislation. Given that all offshore territory was vested in the Commonwealth, the states were left without control over even the territorial sea. The SSLA did not of itself regulate activities in the territorial sea or continental shelf, however; further Commonwealth legislation was needed to alter existing administrative arrangements for offshore petroleum.¹¹² The role of state governments in offshore policy and administration was essentially preserved intact as a hangover of the 1967 Settlement. The curious situation therefore arose whereby the Commonwealth P(SL)A—the prevailing offshore statute—continued to be administered by state ministers acting in their capacity as designated authority.

¹¹⁰ R. Lumb, *The Law of the Sea and Australian Off-Shore Areas* (University of Queensland Press, St Lucia, Queensland, 1966).

¹¹¹ Rothwell and Haward, *op cit* fn 5.

¹¹² Harders, *op cit* fn 8.

Chapter Two recounted how the technical and administrative capacities of the states was an influential factor shaping the 1967 Settlement. Stevenson describes how the state governments fully exploited the strength of their position in the P(SL)A regime to derail the Commonwealth's resources policy under Whitlam.¹¹³ The exploration permits originally issued pursuant to the Agreement—mainly in relation to the north-west shelf and Bass Strait—expired in 1974 and 1975, and the Commonwealth argued that these could not be renewed or reassigned until the High Court had ruled on the validity of the SSLA. Although the Agreement required the states to consult with the Commonwealth before making leasing decisions to afford the latter an option of withholding its consent, Western Australia and Victoria ignored this requirement and announced their intention to unilaterally issue permits –

The most important weapons with which the state governments could resist federal intervention into mineral resources policy were their own administrative and legislative powers ...in the case of offshore oil and gas, which were not in fact the property of the states, the *de facto* control which they had been permitted to exercise since the 1960s enabled them to frustrate the federal Labor government's plans with considerable success. All the states which had granted offshore exploration permits under the terms of the 1967 agreement ignored Mr Connor's request that the permits not be renewed until the High Court had decided on the validity of the *Seas and Submerged Lands Act*. All were able to do this with impunity, despite the fact that the offshore petroleum was strongly suspected to be, and ultimately proved to be, the property of the federal government.¹¹⁴

In response to state obstructionism, Connor cautioned petroleum companies not to accept any instruments issued by the state governments, prompting the Western Australian Premier [Sir Charles Court] to issue a retaliatory warning. In hindsight, the internecine relations experienced amongst Argyle's 'iron triangle' participants during this time possibly fractured the industry/state consanguinity which was hitherto so pronounced.¹¹⁵ Unsurprisingly,

¹¹³ Stevenson, op cit fn 2.

¹¹⁴ Ibid, p 70.

¹¹⁵ R. Argyle, "Governmental Powers Over Petroleum Recovery Rates-Offshore Western Australia" (1983) 15 *The University of Western Australia Law Review* 14-32.

petroleum companies lost interest in exploring on Australia's continental shelf during this period, which the Commonwealth perceived as attempted intimidation, further inflaming tensions. As Stevenson notes, "Thus relations on both sides went from bad to worse."¹¹⁶

In terms of tracing the evolution of the P(SL)A into the next phase, it is important to reiterate that although all states were dispossessed of offshore identity by the SSLA its effect upon offshore petroleum was limited to the two prospective states. Only Victoria and Western Australia lost tangible benefits in 1973, subsequent to which intergovernmental interaction with respect to offshore petroleum is seen to become increasingly specific between the Commonwealth and one of these states –

Although the controversy over the bill in 1973 involved all of the states, the continuing conflict over offshore petroleum increasingly narrowed down to a confrontation between the federal government and Western Australia. The other states, aside from Victoria, were protecting their rights to hypothetical petroleum that probably did not even exist.¹¹⁷

The judicial challenge to the SSLA launched by the states was therefore not motivated to recover rights to offshore resources. It was more fundamentally concerned with identity within the federation, as well as to curtail the potential for Commonwealth intrusion into other areas of marine policy.

3.4.3 Commonwealth marine environmental policy

The *Seas and Submerged Lands Act* was clearly an ambit statement of the Commonwealth's offshore resources policy. It is important also to recognise that this statute was the vehicle through which Whitlam was able to introduce proposals for protecting the marine environment. The more successful component of this legislative policy was enactment of the *Great Barrier Reef Marine Park Act 1975* (Cth).

¹¹⁶ Stevenson, op cit fn 2 p 78.

¹¹⁷ Ibid, p 40.

Commonwealth concerns over the Great Barrier Reef had been festering since the late 1960s with fishing by Japanese vessels in nearshore waters of the Great Barrier Reef. The Commonwealth's partial response at that time was to legislate to control access to Australian waters by creating the DFZ and the licensing regime under the *Continental Shelf (Living Natural Resources) Act*. In the expectation that the High Court would uphold the SSLA, the Whitlam Government in 1975 enacted the GBRMPA to assert Commonwealth jurisdiction over the Great Barrier Reef, in spite of trenchant resistance by the Queensland Government.¹¹⁸ Notwithstanding the New Federalism policy of the subsequent Fraser Government, the Commonwealth retained to itself control over the Great Barrier Reef under the terms of the OCS after returning the three miles of coastal waters to the states [more in Chapter Four].¹¹⁹

The less successful component of Whitlam's marine environmental policy was to enact a legislative package addressing pollution of the sea.¹²⁰ During the early 1970s, a series of marine pollution incidences witnessed around the Australian coastline underscored the Commonwealth's belief that a national solution to marine pollution was needed. These incidences

¹¹⁸ A. Gilpin, *The Australian Environment* (Sun Books, Melbourne, 1980); Haward, op cit fn 36.

¹¹⁹ The legislative activism of the Whitlam Commonwealth with respect to the environment has been acknowledged by several authors. In short succession four statutes addressing environmental impact assessment and nature conservation were enacted by the Commonwealth. This spurt of legislative policy-making is described by Davis: "These issues were brought into sharper focus and debate during the period of environmental concern of the early 1970s, when many governments enacted legislation aimed at improved environmental protection, new forms of land use allocation and management, as well as enlargement of National Parks and protected areas jurisdiction. The reformist Whitlam Government followed this trend, enacting four statutes which now constitute the foundations of Federal environmental policy: *The Environment Protection (Impact of Proposals) Act* (1974), *The Australian National Parks & Wildlife Conservation Act* (1975), *The Great Barrier Reef Marine Park Act* (1975), *The Australian Heritage Commission Act* (1975)." B. Davis, "Federal-State Tensions in Australian Environmental Management: The World Heritage Issue", in K. Walker (ed), *Australian Environmental Policy* (New South Wales University Press, Kensington, 1992) pp 215-232, p 217. See also: M. Crommelin, "Commonwealth Involvement in Environment Policy: Past, Present and Future" (1987) 4 *Environmental and Planning Law Journal* 101-112; R. Fowler, "Environmental Law and its Administration in Australia" (1984) 8 *Environmental and Planning Law Journal* 10-49.

¹²⁰ Burmester, op cit fn 22; Hildreth, op cit fn 3.

included arsenic dumping off Western Australia, mercury poisoning of sharks in Victorian waters, and the grounding of the 'Oceanic Grandeur' in the Great Barrier Reef.¹²¹ Whitlam made marine pollution a central issue in attacks on the Government before assending to office.¹²² In particular, the Opposition advocated the enactment of Commonwealth legislation based upon the trade and commerce and external affairs head powers to enable it to intervene in marine pollution policy.¹²³ Once in power, the Labor Government committed itself to enacting legislation to occupy the field of marine pollution policy, based upon the resolution of jurisdiction achieved by the SSLA. This commitment is made explicit by the Environment Minister, Moss Cass –

We will be doing a lot more in our own territories and, after the constitutional issues particularly relating to the company power and the Territorial Sea have been made clear, we hope to use such power to encourage good planning of the coastline in the States ... Again, after our constitutional power is clarified, we will be looking at this act [the National Environmental Policy Act] when we design a Marine Environment Protection Act for Australia. This is an act which has already been the subject of discussions which I have had with my department. It will be based on the Fishery power as well as the Territorial Sea power once this is settled.¹²⁴

Before being able to capitalize upon its confirmed jurisdictional capabilities, with respect to both resources and the environment, The Whitlam Labor Government fell from office. Boardman notes that had Whitlam survived beyond 1975, the confirmation by the High Court of the SSLA would have "consolidate[d] the Commonwealth's authority as the main level of government in Australia empowered to formulate marine pollution

¹²¹ R. Boardman, *Global Regimes and Nation-States: Environmental Issues in Australian Politics* (Carleton University Press, Ottawa, 1990).

¹²² *Hansard*, House of Representatives, 12 September 1970, p 1122.

¹²³ Boardman, op cit fn 121.

¹²⁴ M. Cass, "Progress?" paper presented at *The Impact of Human Activities on Coastal Zones* (Australian UNESCO Committee for Man and the Biosphere, Sydney, 1973) pp 175-179, p 177.

policy.”¹²⁵ The important point to emerge from these developments is the intention of the SSLA to enable Commonwealth action in many areas of marine policy. As well, the SSLA was the bridge between national and international marine policy—for both the conservation and development of resources—which the discussion now introduces.

3.4.4 Australia and UNCLOS III under Whitlam

This section describes the Whitlam Government’s policy towards the Third United Nations Conference on the Law of the Sea during its early stages between 1973 and 1975. Because of the brevity of Labor’s term in office, most of the substantive negotiating sessions occurred under the subsequent Fraser Government [nine sessions compared with three]. Australia’s contributions to the final treaty are therefore more appropriately detailed in the following chapter. The present description serves mainly to highlight the Commonwealth’s UNCLOS position originally propounded under Whitlam.

Earlier discussions alluded to a remarkable consistency in policy between successive Commonwealth governments as the defining feature of Australia’s approach to the Law of the Sea, along with its perpetual caution not to make unilateral offshore claims.¹²⁶ Reasons proposed for these characteristics include a growing commonality between political parties as to the role of the Commonwealth in marine resources policy, and the difficulties faced by Labor and Coalition governments alike over the domestic limitations of international sea law. Notwithstanding that the Commonwealth’s UNCLOS policy was remarkably consistent over a twenty years period, encompassing preparatory work through final ratification, some policy emphases are nonetheless observed between Whitlam and Fraser, as well as later Labor and Coalition governments in the 1990s.

¹²⁵ Boardman, *op cit* fn 121 p 69.

¹²⁶ Burmester, *op cit* fn 6; Suter, *op cit* fn 22.

A notable feature of Whitlam's Prime Ministership was his promotion generally of Australian activity in international affairs, and at UNCLOS in particular.¹²⁷ Beginning with the first negotiating session in 1974, Australia under Whitlam's helm pursued the development of a comprehensive Law of the Sea package. The main elements of this policy included –

- claiming rights to the edge of the continental margin (discussed further below);
- promoting the concept of a 200-mile offshore zone while stressing freedom of navigation;
- opposing any widening of the territorial sea beyond three miles because of the restrictions to navigation presented thereby;
- liberalizing marine scientific research but vesting in coastal States the power to regulate such activity;
- extending the powers of the coastal State to control marine pollution;
- supporting the notion of seabed mining and the International Seabed Authority (more later).¹²⁸

The Fraser Government maintained the Commonwealth's desire to ensure universal support for a Law of the Sea package generally, and particularly with respect to the continental shelf. Although other policy areas became less important under Fraser, Bergin notes that "The margin goal was the top priority over the life of the Conference."¹²⁹ The main distinction between the two governments' Law of the Sea policy was Whitlam's attempt to enhance powers for protecting the marine environment, and support for an enclosed offshore zone.¹³⁰

¹²⁷ Ibid, Suter.

¹²⁸ Bergin (1983), op cit fn 17.

¹²⁹ A. Bergin, "Australia's Contribution to the Convention", in M. Tsamenyi, S. Bateman and J. Delaney (ed), *The United Nations Convention on the Law of the Sea: What it Means to Australia and Australian Industries* (University of Wollongong, Wollongong, 1996) pp 17-41, p 35.

¹³⁰ Details of developments regarding extended offshore zones are described in Chapter Four following, when the Commonwealth finally in 1978 asserted limited jurisdiction out to 200 miles. It is worth recalling that during the early 1970s Australia still only claimed the continental shelf and the 12-mile declared fishing zone.

As the previous section showed, Whitlam was concerned with advancing domestic policy interests more broadly than just in terms of offshore petroleum, and this approach was projected into international fora. Immediately prior to UNCLOS in 1973, the International Convention for the Prevention of Pollution from Ships was being concluded, at which Australia argued for stronger coastal State controls over marine pollution. The proposed measures failed to materialize, however, and the proposition was deferred to Law of the Sea negotiations where the same hard line was originally advanced.¹³¹ The Commonwealth was similarly enthusiastic for the concept of an enclosed offshore zone during the first few negotiating sessions, but this enthusiasm also abated with the change of government.

The Commonwealth's Law of the Sea policy reveals an alignment between national and international sea law. The *Seas and Submerged Lands Act* was clearly intended to clarify Commonwealth/state jurisdiction, but it was also the instrument by which the Commonwealth could adopt international maritime codes domestically.¹³² As Herr and Davis remark, whilst UNCLOS "did not instigate or sustain the Whitlam Government's resolve to make the claim [SSLA], it only reaffirmed the logic of national primacy offshore."¹³³ In the event, the demise of the Whitlam Government saw a moderated approach towards pollution control ushered in, as described further in the next chapter.¹³⁴

The area where the Commonwealth displayed the greatest consistency over time in its Law of the Sea policy was in relation to the continental shelf.

¹³¹ Boardman, op cit fn 121. The Commonwealth's frustration at its lack of success with respect to the marine environment tempted it to act unilaterally, as revealed in an ambiguous statement made at that time: "Australia reserves its position entirely to impose whatever conditions it may lawfully impose within its jurisdiction to protect from pollution the marine environment adjacent to Australia." Burmester, op cit fn 22 p 446.

¹³² Bergin, op cit fn 129.

¹³³ Herr and Davis, op cit fn 92 p 691.

¹³⁴ Burmester, op cit fn 22; Hildreth, op cit fn 3.

Following Arvo Pardo's precipitous plea to the United Nations in 1968 the 'Ad Hoc Committee to Study the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction' was established. Within a year, the Committee had been transformed into a permanent Seabed Committee charged with preparatory responsibilities related to UNCLOS III, a forum in which Australia involved itself heavily in an effort to have its preferred continental shelf regime accepted.¹³⁵ The Attorney-General explained the Commonwealth's involvement in the Seabed Committee as a strategic response to domestic jurisdictional problems –

A committee of thirty-five states was appointed by the Convention on the Continental Shelf to look into the control of the deep-sea bed beyond the coastal state boundaries of the continental shelf. Australia was a member of this committee ... This would enable Australia not only to advance the interests of underdeveloped countries but also to safeguard our interests in whatever course this committee takes in dealing with the sea bed beyond the coastal boundaries. I suggest that the Government has been extremely active in this field. It is really a travesty of the facts to suggest that it has been timid and has not been active.¹³⁶

The Commonwealth's interest in contributing to the development of the new seabed regimes is easily understood. Firstly, the Commonwealth was keen to preserve the continental shelf regime established by the convention arising from UNCLOS I, having become comfortable with the definitions contained therein. Australia also considered that the proposed international seabed area should neither encompass nor intrude into the existing continental shelf of coastal States. In other words, the seaward limit of national jurisdiction determined the inward extent of the new seabed regime.¹³⁷ The two offshore mining regimes would therefore exist in parallel.¹³⁸ In Bergin's terms –

¹³⁵ Bergin (1982), op cit fn 17.

¹³⁶ *Hansard*, House of Representatives [Nigel Bowen, Attorney-General], 28 November 1968, pp 3435-6.

¹³⁷ Shearer, op cit fn 6.

¹³⁸ Bergin, op cit fn 129.

The 1958 Convention was, from Australia's point of view, satisfactory as it did not define the limit of coastal state jurisdiction over the continental shelf in a way that would forfeit oil and gas resources off Australia's broad shelf. Australia was thus anxious to ensure that valuable areas of shelf would not pass from national jurisdiction to the jurisdiction of Pardo's proposed ISA.¹³⁹

In 1973, the Commonwealth expressed its policy option seeking to extend jurisdiction to the edge of the continental margin, pursuant to the 1958 Convention. The method of granting exploration permits and production licences within graticular blocks, or 'picture frames', negated the need to define the outer limit of the continental margin.¹⁴⁰ The Whitlam Government nonetheless conceded that a more precise definition of the continental shelf would be needed to better mesh the international seabed regime—the 'common heritage of mankind'—with that of the coastal State.¹⁴¹ Chapter Four describes how Australia's insistence on this point distinguished it from other parties over the life of the Conference.

Whilst optimizing control over the continental shelf was the Commonwealth's priority in terms of Law of the Sea policy, less attention was directed to the relationship between the continental shelf regime and the proposed exclusive economic zone. As Attard observes, it is quite possible to maintain a continental shelf without an overlying zone because the latter requires express proclamation, unlike the continental shelf which is more easily extended if the natural prolongation so allows.¹⁴² This position was articulated by the Australian delegate to the second negotiating session in 1974 –

First, it was necessary to respect existing sovereign rights to coastal States over the resources of the natural prolongation of their land territories, as in the case of their territories above sea level. Secondly, the

¹³⁹ Bergin (1982), op cit fn 17 p 46.

¹⁴⁰ Landale and Burmester, op cit fn 17.

¹⁴¹ Ibid.

¹⁴² D. Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, Oxford, London, 1987).

submerged lands mass of certain States extended beyond 200 miles. In the case of some countries, including Australia, the extension was only a small area ... Thirdly, the Convention should define not only the area of the continental shelf but also the rights and duties pertaining to it. They were already well established, having been embodied in the 1958 Geneva Convention ... The rights and duties of the coastal State in relation to the superjacent waters would be dealt with in connection with the proposed 200-mile economic zone; beyond 200 miles, the superjacent waters would, of course, be part of the high seas.¹⁴³

Under the successive Fraser Government, the Commonwealth came to emphasise the distinction between the continental shelf and superjacent waters, and gave effect to the latter almost with reluctance.¹⁴⁴ The eventual adoption in Commonwealth legislation of the updated LOSC regimes in 1994 perpetuated this distinction, although the framework created by the OCS was as much the cause of this perpetuation as any desire to keep the regimes separate [more in later chapters].¹⁴⁵

It is necessary to also briefly foreshadow the composition of the Commonwealth delegation to UNCLOS because of its importance in sharpening Australia's policy approach during negotiations. The Law of the Sea task force was established in the latter part of 1974, with the Department of Foreign Affairs as the nominated lead agency. From the outset, this department was in disagreement with the Commonwealth's minerals and energy portfolio interests in terms of how aggressively Australia should pursue its policy of asserting coastal State jurisdiction to the margin of the continental shelf. As will be seen in Chapters Four and Six, Australia did fare very well from the Law of the Sea Convention, notwithstanding that the Commonwealth's foreign policy interests did prevail over certain resource

¹⁴³ Ibid p 138.

¹⁴⁴ N. Evans, "LOSC, Offshore Resources and Australian Marine Policy" (1996) 20 *Marine Policy* 223-227.

¹⁴⁵ D. Rothwell, "Australia and the United Nations Convention on the Law of the Sea" (1994) 24 *International Law News* 30-35; Rothwell and Haward, op cit fn 5.

exploitation policies, as a result of the lead agency status given to Foreign Affairs.¹⁴⁶

3.4.5 *New South Wales v the Commonwealth*

The final important marine policy event to occur during the Whitlam Government was the conclusion to the *Seas and Submerged Lands Act*. All the states were dispossessed of offshore territory by the SSLA and predictably challenged the validity of the statute in the High Court. As mentioned, because prospective offshore basins were localized to just two areas the motivation for states to seek collective redress was not the desire to regain control over petroleum resources, but rather umbrage at the loss of state identity.¹⁴⁷ The two petroleum-producing states—Western Australia and Victoria—did effectively lose sovereign rights over proven offshore reserves as a consequence of the SSLA, and although the legislative regime had been left intact Whitlam had quite plainly delayed rather than precluded altering these arrangements.¹⁴⁸ For these reasons, all Australian states led by New South Wales enjoined in action in 1975 seeking to have the SSLA declared invalid.

A number of questions pertaining to offshore jurisdiction were answered by the High Court in the ensuing case, *New South Wales v the Commonwealth*.¹⁴⁹ The accumulation of these questions was the proposition that if the territorial sea and continental shelf were within the limits of states as a consequence of colonial roots, and neither federation nor the international personality of Australia vested these areas in the Commonwealth, the *Seas and Submerged Lands Act* was invalid because it

¹⁴⁶ Bergin (1983), op cit fn 17.

¹⁴⁷ P. Goldsworthy, "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Seas and Submerged Lands Act Case (State of New South Wales and Ors v. the Commonwealth of Australia)" (1976) 50 *The Australian Law Journal* 175-184.

¹⁴⁸ *Hansard*, House of Representatives, 10 May 1973, p 2006.

¹⁴⁹ *New South Wales v the Commonwealth* (1975) 135 CLR 337.

altered state boundaries without observing the formula specified in section 123 of the Constitution.¹⁵⁰ On all matters the case was determined resoundingly in the Commonwealth's favour. Whilst some of these findings were entirely foreseeable the High Court also articulated several unexpected judgements. The more significant rulings included that –

- the *Seas and Submerged Lands Act* was a valid exercise of the external affairs head of power as it implemented the purposes of an international treaty;
- the same power also supported the SSLA in a literal sense as its subject matter—offshore waters—were geographically external to Australia;
- the Commonwealth was the only Australian entity recognizable for the purposes of international treaty law; and
- offshore rights accrued to the Commonwealth as an incident of federation in 1901 rather than to the states, as was previously assumed to be the case.¹⁵¹

It was unsurprising that the continental shelf fell within the exclusive legislative province of the Commonwealth as this ruling concurred with the legal opinion stretching back to at least 1967. Considerably more difficult for the states to accept were those aspects of the decision pertaining to the territorial sea. The High Court ruled that states did not have any claim of sovereignty over the adjacent territorial sea, for two discernible reasons. Firstly, because this strip of water was the product of an international treaty to which Australia was signatory jurisdiction accrued to the Commonwealth pursuant to the external affairs power. However, the judgement went further

¹⁵⁰ Oakes and Rothwell, op cit fn 36. "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395-431. Section 123 of the Constitution spells out a formula for altering the boundaries of states: "The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected."

¹⁵¹ *New South Wales v the Commonwealth* (1975) 135 CLR 337.

in considering the common law bases of the territorial sea. The High Court determined that sovereignty over the territorial sea had belonged to the Commonwealth since federation, and never in fact belonged to the states whose colonial ties to adjacent waters had been eclipsed by the act of federation. In other words, even in the absence of UNCLOS and the *Seas and Submerged Lands Act* the territorial sea became exclusively the sovereignty of the Commonwealth.

The declaratory nature of the SSLA gave effect to the Commonwealth's antecedent claim to the territorial sea. Cullen observes that this method of jurisdictional assertion particularly offended the states in 1973 because of its suggestion that the Commonwealth had a historical basis to its offshore claims, which the High Court did finally confirm.¹⁵² Waugh explains the feature of the declaratory approach –

It was a characteristic of the provisions being considered by the Court that, in effect, they declared the existence of the power by which they were enacted. The sovereignty described in the Act included the power to declare its existence. To uphold the Act is not to say that the sovereignty there declared is conferred by its provisions; rather, it is to say that the declaration is a valid description of power existing under the Constitution and anterior to the Act. The Act was thus an exercise of a previously untried power.¹⁵³

In spite of its scope, the decision in *New South Wales v the Commonwealth* did not directly contemplate the P(SL)A regime. Several key issues pertaining to the offshore petroleum legislation therefore went begging. Firstly, the High Court did not consider the legality of the states administering Commonwealth law as the designated authority. Harders notes that the nature of sovereignty over the territorial sea was also unclarified as to whether the Commonwealth enjoyed an exclusive or concurrent authority to regulate resources development.¹⁵⁴

¹⁵² Cullen, op cit fn 1.

¹⁵³ Waugh, op cit fn 29 p 7.

¹⁵⁴ Harders, op cit fn 8.

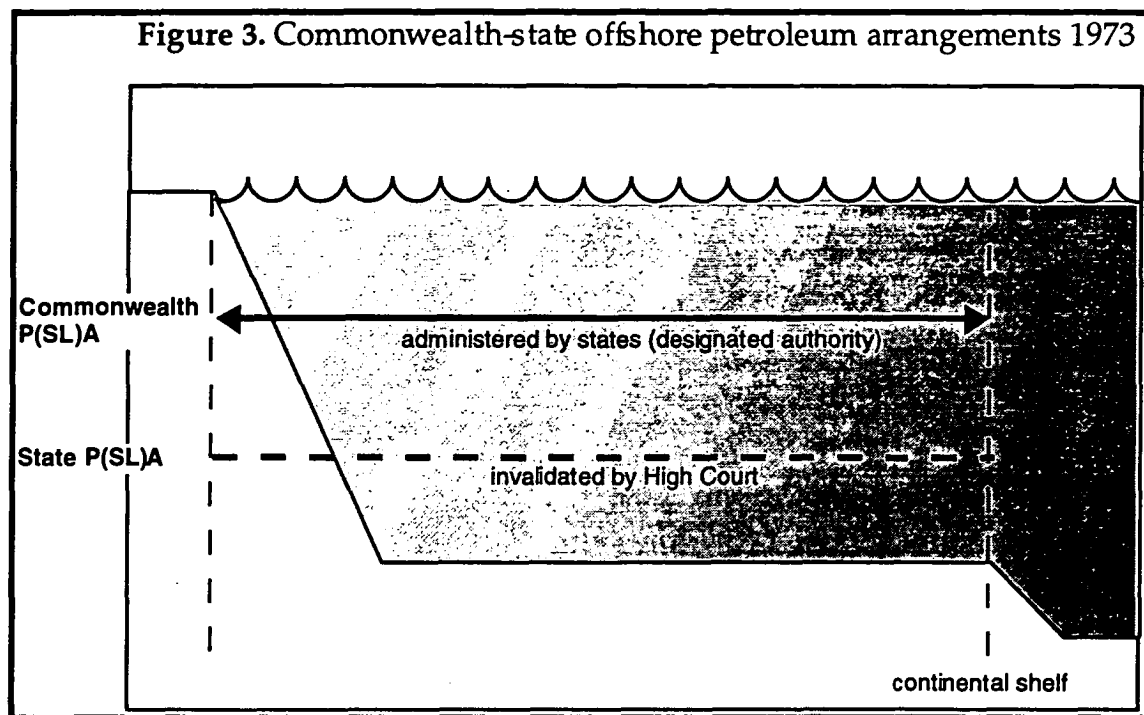
Perhaps most importantly, the attempt of the Settlement to manufacture consistency between the Commonwealth and state legislation was also left outstanding. To avoid the operation of s 109 of the Constitution [the inconsistency provision] Chapter Two described how section 150 was included in the Commonwealth P(SL)A to allow both overlapping statutes to apply to the same area.¹⁵⁵ If some state powers with respect to offshore petroleum were left intact by *New South Wales v the Commonwealth*, the latter's P(SL)A was probably assured of paramountcy by section 109.¹⁵⁶ The High Court was generally silent on the thorny issue of the administration of the P(SL)A. Nonetheless, the SSLA and the resultant case almost certainly rendered invalid the offshore petroleum legislation of the states. Cullen notes that the state P(SL)Acts were "early casualties" of the High Court decision –

This conclusion followed from the finding in the Commonwealth's favour which suggested that the Petroleum (Submerged Lands) Act 1967 (Cth.) was in force in the whole of each of the adjacent areas of the states, leaving no scope for the operation of the state 'mirror legislation'. And, in so far as state 'mirror' legislation asserted any sovereignty in the adjacent areas, it likely was inconsistent with the Seas and Submerged Lands Act.¹⁵⁷

¹⁵⁵ To enable the overlapping statutes to operate as intended the Commonwealth's *Petroleum (Submerged Lands) Act* was stated not to affect the operation of any similar state legislation [s. 150]. At that time doubt was cast upon the efficacy of this device.

¹⁵⁶ Cullen, op cit fn 1.

¹⁵⁷ Cullen, op cit fn 3 p 91.



Because of the High Court's silence, though, the states were able to serve in their capacities as designated authorities until a new offshore petroleum regime was emplaced years later under the OCS.¹⁵⁸ In a bitter twist of fate, the Whitlam Government fell from office three days after the *New South Wales v the Commonwealth* judgement was delivered, effectively negating the need to immediately revisit the offshore arrangements because the incoming Fraser Government's New Federalism platform. The effect of the 1975 decision was to therefore confirm that Commonwealth rather than state law applied in the offshore areas while leaving the administrative arrangement unchanged. This curious legal situation is depicted in Figure 3.

3.5 CONCLUSION TO CHAPTER THREE

The most apparent trend of the period between 1970-75 was the assertiveness on the part of the Commonwealth to emplace national legislative policies for developing and conserving resources. Two successive Commonwealth

¹⁵⁸ Crommelin, op cit fn 3.

governments took a more active role in marine policy during this time, motivated by a number of growing problems over resources and the environment. Two evolving features in particular are worth highlighting: a narrowing in approach between governments towards a Commonwealth offshore resources policy; and the enactment of legislation as the vehicle through which this could be progressed, regardless of state concerns.¹⁵⁹

Whilst factors such as marine pollution and the emerging Law of the Sea explain the impetus towards greater Commonwealth involvement in offshore legislative policy, these do not fully account for the complete reform in Commonwealth/state interaction attempted during this period, nor the consequential deterioration in relations. The balance of the explanation is found in the emergence of a political ideology driven by centralist Prime Ministers of both parties—Gorton and Whitlam—who were keen for the Commonwealth to intervene more directly in offshore resources policy.

Whitlam was more successful than his predecessor in legislating to assert Commonwealth jurisdiction over the offshore. In the event, intergovernmental forces conspired to prevent the Whitlam Government from appreciating the Commonwealth's newly confirmed powers. The necessity for state administration of the P(SL)A regime enabled state governments to foil the Commonwealth's expansive offshore policies. As Mathews notes "... by withholding prompt commitment of their governments to joint schemes, State ministers may attempt to put pressure on the Federal Government."¹⁶⁰ To this end, the states were aided by the strength of their relationship with the petroleum industry. The absurd situation therefore arose whereby the Commonwealth exercised complete jurisdiction offshore to the preclusion of the states while the latter sphere of

¹⁵⁹ Herr and Davis, *op cit* fn 92.

¹⁶⁰ Weller and Smith, *op cit* fn 79 p 93.

government used administrative means to frustrate the Commonwealth's legislative policies.

The case *New South Wales v the Commonwealth* convincingly vindicated the Commonwealth's legislative actions towards the offshore. This judgement also raised new issues and left some questions unanswered. The most important of these related to the states' ability to administer the offshore petroleum regime in light of the High Court's decision in 1975. Before political and administrative readjustment could occur to better comport with this legal imperative, the Whitlam Government fell from office, due in no small way to the strain placed on the federation by several years of internecine relations.

Stevenson describes this intergovernmental and industrial tension in the following terms –

The fall of the Labor government at the end of 1975 was obviously welcomed by most, if not all, of the mining and petroleum firms in Australia. But it is too early to say what long-term effect the experience with Labor will have on the industry's relations with the federal government. The industry is aware that the trend towards greater federal intervention in mineral resource policy began before December 1972 and can never be entirely reversed ... The general feeling among mining and petroleum people seems to be that Labor governments are innocuous at the state level, but that at the federal level they can do considerable to the industry.¹⁶¹

Notwithstanding the sweeping changes in national mood ushered in 1976, Western Australia and Victoria were still confronted with uncertainties over offshore petroleum. Moreover, all the states were dissatisfied with *New South Wales v the Commonwealth* and were anxious to regain both the territory and identity lost to the Commonwealth. It was this anxiety that drove the offshore jurisdictional conflict into the third chapter of its history, which the thesis now examines. As will be seen, the Offshore Constitutional

¹⁶¹ Stevenson, op cit fn 2 p 78.

Settlement reached in 1980 gave to Western Australia a very favourable arrangement with the Commonwealth in the context of this national framework, as a function of political relations and the booming north-west shelf ventures. This state therefore fared much better than did other states, but secured this position to a large extent at the Commonwealth's convenience.

Chapter Four

Cooperative Federalism and Offshore Petroleum – 1976-1983

The third phase of the evolution of the *Petroleum Submerged Lands Act* represents the antithesis of the inter-governmental hostility of the Whitlam era. Under the precedent Labor Government, the Commonwealth boldly entered into areas of policy which hitherto had been the unchallenged province of the states, most confrontationally by asserting jurisdiction over the offshore. In 1975, the Fraser Coalition Government came to power riding a wave of anti-Whitlam backlash known as New Federalism, which sought to restore the federal balance and readmit the states to a substantial offshore role. Political opportunism, and the impossibility of ignoring the role historically occupied by the states, combined to ensure that the respective roles of the Commonwealth and states would be restored to the offshore situation which approximated that pre-dating the Whitlam Government. This new arrangement was termed the Offshore Constitutional Settlement [OCS].¹

Much has been made of the cooperative spirit embodied in the OCS, and the return to the states of jurisdiction over the three-mile territorial sea. As well, the OCS provided for the input of these governments into resource regimes located in Commonwealth waters beyond.² Most analyses tend to focus upon fisheries regimes, however, and overlook the detailed content of

¹ M. Haward, "The Australian Offshore Constitutional Settlement" (1989) 13 *Marine Policy* 334-348.

² M. Crommelin, "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 *Australian Mining and Petroleum Law Journal* 191-213; R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" (1988) 6 *Journal of Energy and Natural Resources Law* 213-247; B. Davis, "Federal-State Tensions in Australian Environmental Management: The World Heritage Issue", in K. Walker (ed), *Australian Environmental Policy* (New South Wales University Press, Kensington, 1992) pp 215-232; R. Hildreth, "Australian Coastal Management: a North American Perspective" (1992) 9 *Environmental and Planning Law Journal* 165-174.

the minerals and petroleum legislation. Moreover, the intention of the OCS is often overstated in interpretations of the New Federalism period. For example, the fact that the OCS was never an integral part of Fraser's New Federalism policy is often overlooked by scholars.³ As has been recognised by several others, though, despite the Fraser Government returning to the states some important marine policy capabilities, these were quite marginal compared with those exercised by this sphere of government prior to 1972.⁴ In other words, although the Fraser Government retreated from the exclusive Commonwealth marine policy role achieved by the *Seas and Submerged Lands Act*, it nonetheless retained the significant capabilities it had acquired under Whitlam, particularly in terms of offshore petroleum policy.

This chapter documents the development of the OCS, and examines in detail the form of the enabling legislation and the new offshore petroleum regime. The first part discusses several influential factors leading to the OCS in 1980 while part 2.1 details at length its constitutional bases. In the third part, the offshore petroleum regime is described and analysed where it is seen that the Commonwealth amended the P(SL)A to guarantee the states a continued role in continental shelf policy. On the one hand, the legislation enabled the Commonwealth to ultimately prevail in relation to petroleum decisions made in respect of the continental shelf, having become accustomed to the exercise of important policy making powers under the P(SL)A. At the same time, the states continued to administer exclusive decision-making powers of the Commonwealth under that same statute.

³ M. Haward, *Federalism and the Australian Offshore Constitutional Settlement* (University of Tasmania, PhD thesis, 1992) pp 160-165.

⁴ N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204; R. Kay and C. Lester, "Benchmarking the Future Direction for Coastal Management in Australia" (1997) 25 *Coastal Management* 265-292; B. Opeskin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395-431.

4.1 BUILD-UP TO THE OCS

4.1.1 Fraser's New Federalism

The Whitlam Government's ascendancy was as brief as it was volatile. Just three days before the High Court delivered its decision in *New South Wales v the Commonwealth*, the federal government fell from office in spectacular and controversial fashion.⁵ The immediate outcome of this series of events was in equal measure ironic and frustrating. Irony arose from the fact that the Whitlam Government was unable to exercise the Commonwealth's newly confirmed powers over the offshore, despite having agitated for the clarification of these for two decades and enacting legislation to this end in 1973. The situation was frustrating as the incoming Fraser Coalition Government inherited a legislative scheme it did not desire in entirety, and was compelled to dismantle the *Seas and Submerged Lands Act* framework by use of extraordinary legal and political means.⁶

Under Fraser's leadership, the Commonwealth returned to an inter-governmental style that was strongly supported the notion of states' rights. The important characteristics of this New Federalism policy included –

- distributing income tax revenue in fixed proportions to state and local governments;
- increasing the financial independence of the states; and
- replacing the s. 96 special purpose grants favoured by Whitlam with general assistance to enhance state and local autonomy.

⁵ On 11 November 1975 the Governor-General dismissed the Labor government and dissolved Parliament because the Senate—which was controlled by the Coalition—refused to pass the annual appropriation bills and the government could not gain supply for governing the country. Following the federal election the Coalition formed government and Malcolm Fraser became Prime Minister. The constitutional crisis, as this incident is known, represents the only use by the Governor-General of the reserve powers of that office.

⁶ Haward, *op cit* fn 1.

Groenewegen reviewed the Coalition's restoration of political faith in federalism as a system of government and determined that Fraser's New Federalism was seen as a reaction to the excesses of the Whitlam Government.⁷ Other commentators caution, however, that analyses which emphasise inter-governmental financial adjustments overlook the contribution of the Fraser Government to broad Commonwealth/state reform. For example, Haward and Smith dismiss as overly simplistic the belief that Fraser was simply a catharsis to his predecessor.⁸ Under Fraser, the Commonwealth sought to reduce the role of the federal government by returning to the traditional Coalition position of developing policy sympathetic to the states. Fraser committed the Commonwealth to not acting unilaterally in relation to contentious policy areas, such as the environment and offshore jurisdiction.⁹ As Haward and Smith observe –

The states' reaction to Whitlam's new federalism forced the Liberal Party to overhaul its bland party platform. Under the leadership of Malcolm Fraser, the Liberal Party adopted commitment to cooperative federalism which diametrically opposed Whitlam's confrontationalist approach ... Most attention was focused on the proposals to restructure the taxation sharing arrangements with the states and local government. Although this element attracted the most interest, the implementation of the new federalism in areas such as the offshore, companies and securities, and external affairs proved to have greater longevity than the tax sharing proposals.¹⁰

This reformist view of the Fraser Commonwealth is shared by Saunders and Wiltshire, who describe New Federalism as a rare attempt to devise a coherent philosophy for major public sector activity.¹¹ In particular, Saunders and Wiltshire considered in some depth the inter-governmental

⁷ P. Groenewegen, "The Political Economy of Federalism, 1901-81", in B. Head (ed), *State and Economy in Australia* (Oxford University Press, Melbourne, 1983) pp 169-195.

⁸ M. Haward and G. Smith, "What's New About the 'New Federalism'?" (1992) 27 *Australian Journal of Political Science* 39-51.

⁹ Ibid.

¹⁰ Ibid, p 45.

¹¹ C. Saunders and K. Wiltshire, "Fraser's New Federalism 1975-1980: An Evaluation" (1981) 26 *Australian Journal of Politics and History* 355-371.

arrangements instituted by Fraser in relation to international matters, an area of especial concern to state governments. The participation of the states in UNCLOS III—the international policy area most relevant to offshore petroleum resources—is discussed in section 4.1.3 below. It is convenient, however, to introduce these mechanisms here because of what they reveal about state involvement in Commonwealth processes at the time.

Firstly, it is important to recall that the *Seas and Submerged Lands Act* 1973 (Cth) was upheld, based in part upon the external affairs head of power. Writing in 1981, Saunders and Wiltshire contemplated the extent of the Commonwealth's power to legislate with respect to external affairs, and suggested of expansive portents –

Pursant to s. 51(xxix) of the commonwealth Constitution the commonwealth Parliament has power to legislate with respect to 'external affairs'. The precise limits of the power are uncertain ...As the subjects of international concern become more diverse the power of the commonwealth to legislate pursuant to s. 51(xxix) for matters hitherto considered exclusively of state concern increases correspondingly. Whether, if this process continued, judicial limits eventually would be placed upon the categories of international arrangements which could be implemented in this way is a matter for speculation only.¹²

Only two years later, the celebrated Tasmanian Dams case [introduced in Chapter One] was heard, wherein Commonwealth legislation implementing the World Heritage Convention was upheld. In spite of the Commonwealth's obvious capacity to exclude the states from international affairs, between 1977 and 1979 principles and then procedures specifying state involvement were reached in Premiers' Conferences. There were five elements to these arrangements –

- (i) states were to be informed in all cases and at an early stage of any treaty discussions Australia decided to join;
- (ii) the Commonwealth would consult with the states before legislating to adopt a treaty affecting a legislative area within the states'

¹² Ibid, p 367.

- traditional area of competence, to provide the latter jurisdiction with the option of first legislating to give effect to the treaty;
- (iii) representatives of the states were to be included in delegations to appropriate international fora, to enable them to be informed and provide a view to the Commonwealth, but not to share in making policy decisions for Australia;
 - (iv) the Commonwealth was to consider seeking the inclusion of federal clauses in individual treaties that intrude upon matters handled under state law; and
 - (v) before becoming party to a treaty containing a federal clause the Commonwealth would first ensure that the laws of the states conformed with the mandatory treaty provisions.¹³

On the one hand, these arrangements represented concessions to the states that were consistent with the spirit of New Federalism, and were a means through which state governments could participate in international treaty making. Upon closer inspection, though—especially of clause (iii)—it is apparent that the Commonwealth severely limited the extent to which the states could meaningfully contribute to policy development. These limitations are considered further in relation to later Australian Law of the Sea deliberations, but for the moment it is sufficient to recognize that the Commonwealth in the mid 1970s was cautious about returning to the states the expansive roles these governments previously occupied.

It is perhaps not surprising, therefore, that despite the pronouncement and political efforts of the Fraser Government to redefine Commonwealth/state interaction, the expectations of New Federalism went largely unrealized. Galligan and Fletcher note that whilst Fraser took the heat out of inter-governmental relations, "little else was achieved".¹⁴ Similarly, the Fraser experiment ultimately "created more discord between Prime

¹³ R. Herr and B. Davis, "The Impact of UNCLOS III on Australian Federalism" (1986) 41 *International Journal* 674-693.

¹⁴ B. Galligan and C. Fletcher, *New Federalism, Intergovernmental Relations and Environment Policy* (Federalism Research Centre, The Australian National University, Canberra, 1993).

Minister and Premiers than was expected in December 1975".¹⁵ Groenewegen suggested that the Liberal Party philosophy of expanding state functions to strengthen federalism was incompatible with the pervasive contraction of government for policy and political reasons.¹⁶

At the same time, though, it is important to acknowledge the Commonwealth's own agenda. This sphere of government had clearly become accustomed to the expanded policy making role it had so recently acquired. Notwithstanding the broad direction of inter-governmental relations under Fraser, Kay and Lester noted that the Commonwealth was reluctant to relinquish too much of the power it had gained under Whitlam –

His successor, Malcolm Fraser (Liberal) came to office with a pro-states platform, avowing to redress the financial independence to the states. This too was branded "New Federalism". However, Fraser's government either found this too difficult a task, or enjoyed its increased power too much, to change the status quo.¹⁷

The context for efforts to redefine inter-governmental relations were thus a hybrid of state government desires to assume their former privileged positions, and the Commonwealth's willingness to permit them some latitude in this regard while reserving to itself the more significant policy functions. This characterisation applies to broad public policy directions as well as to the particularities of offshore federalism.

4.1.2 High Court decisions and offshore jurisdiction

As was seen in the preceding phase of the offshore saga, High Court decisions delivered in tandem with a shift in political mood enhanced the Commonwealth's wherewithal to emplace a new offshore policy framework. During the pre-OCS negotiation period, two judgements fueled efforts to redefine the roles of the Commonwealth and states in marine resources

¹⁵ Groenewegen, *op cit* fn 7 p 186.

¹⁶ *Ibid.*

¹⁷ Kay and Lester, *op cit* fn 4 p 269.

legislative policy. Although these decisions are more directly relevant to fisheries management than petroleum development, they are reviewed here to better appreciate the illustrate the continued influence of the High Court on offshore jurisdictional arrangements.

4.1.2.1 *Pearce v Florenca*

The facts of *Pearce v Florenca* were simple enough, as with the earlier case *Bonser v LaMacchia*. The defendant, Florenca, was prosecuted under the *Fisheries Act* (1905) WA for catching undersized fish within two miles of the Western Australian coast, and sought to have the charges dismissed on the grounds that the provisions of the *Fisheries Act* were inoperative beyond the low water mark. At the time, the *Fisheries Act* 1952 (Cth) was expressed to apply only beyond three miles, for the reasons canvassed in Chapter Two. The defendant argued that the Western Australian legislation—the only legislation applying to the area where the offence occurred—was invalidated by the decision in *New South Wales v the Commonwealth*.¹⁸

The judgement in *Pearce v Florenca* was handed down in mid-1976. The High Court unanimously upheld the validity of the *Fisheries Act* 1905 (WA) on two grounds. Firstly, it was determined that the capacity to legislate in respect of areas three miles seaward of the coastline was within the state's extra-territorial legislative competence. Also, there was no conflict between the Western Australian fisheries legislation and the *Seas and Submerged Lands Act* 1973 (Cth).¹⁹

On the first point, the High Court held the fact that the Western Australian *Fisheries Act* purported to extend offshore to the traditional three-

¹⁸ R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (The Federation Press, Sydney, 1990) pp 91-92; J. Waugh, *Australian Fisheries Law* (Intergovernmental Relations in Victoria Program, The University of Melbourne, Melbourne, 1988).

¹⁹ *Pearce v Florenca* (1976) 135 CLR 507.

mile limit provided the sufficient nexus to render the law valid. Moreover, the opinion was advanced that the power of states to legislate extra-territorially was not even necessarily limited to three miles. In terms of the relationship between the *Fisheries Act* 1905 (WA) and the *Seas and Submerged Lands Act*, the High Court confirmed that s 16 of the latter statute enabled the concurrent operation of state legislation which did not assert sovereignty or sovereign rights in relation to offshore areas (the savings provision).²⁰ Because the *Fisheries Act* did not express any such claims, it was therefore protected by the savings provisions of the *Seas and Submerged Lands Act* and was unaffected by the ambit of the latter statute.²¹

The decision in *Pearce v Florenca* represented a welcome source of support for efforts to overcome the difficulties presented by the *Seas and Submerged Lands Act*. More remarkable, though, is the fact that two related High Court judgements made within the space of a year—*New South Wales v the Commonwealth* and the the present case—could at the same time favour both the Commonwealth and the states. Haward shows how the decision in *Pearce v Florenca* influenced the shape of OCS negotiations in much the same way as *Bonser v LaMacchia* had encouraged the Commonwealth to introduce legislation asserting its jurisdiction over offshore areas in the early 1970s. The High Court judgement was thus an important legal affirmation of the policy tenets that were being promoted in Commonwealth/state dialogue during the mid-1970s, which led finally to the OCS.

²⁰ In the previous chapter, the intention of including section 16 in the *Seas and Submerged Lands Act* 1973 (Cth) was discussed. The purpose of this provision was to enable other laws—primarily fisheries—to continue to operate unaffected by the declaration of Commonwealth jurisdiction achieved by the SSLA. However, the High Court did not canvass the effect of section 16 in the earlier test case *New South Wales v the Commonwealth*.

²¹ *Pearce v Florenca* (1976) 135 CLR 507.

4.1.2.2 *Raptis v South Australia*

Raptis v South Australia was another case ostensibly involving fisheries. Its relevance to OCS negotiations pertained to the drawing of baselines demarcating the inner extent of offshore zones. The particular issue being considered was the placement of lines drawn by the Commonwealth enclosing indented coastlines. The vehicle through which this capability was tested was the prosecution by South Australia of a fisher operating without a state licence in waters landward of nearshore Kangaroo Island. As well as challenging the validity of the *Fisheries Act* 1971 (SA) the plaintiff also sought a declaration as to the delimitation of state and Commonwealth waters.²²

The judgement—delivered in June 1977—found that the fish had not been caught in waters under the jurisdiction of South Australia. The waters in question comprised neither the three-mile territorial sea or state internal waters, nor were these within South Australia's territorial limits. South Australian legislation therefore did not apply and the *Fisheries Act* 1952 (Cth) was the only applicable law.²³

In terms of the formative OCS, *Raptis v South Australia* compelled the Commonwealth to draw the territorial sea baselines with great caution, so as not to offend either domestic or international law. Particular difficulties with baseline drawing were encountered in relation to the Great Barrier Reef.²⁴ As well, massive tidal movements on the north-west shelf were critical in determining offshore boundaries, and in turn the areas within which the Commonwealth and Western Australian offshore petroleum legislation operated.²⁵ Section 4.2 shows how finalization of the OCS was delayed a

²² Cullen, op cit fn 18 pp 94-96.

²³ *Raptis v South Australia* (1977) 138 CLR 346.

²⁴ Haward, op cit fn 3 pp 180-187; J. Prescott, "An Agenda of Political Maritime Issues for Australia", in *Australia's Maritime Horizons in the 1980's* (Occasional Papers in Maritime Affairs: 1, 1982) pp 51-65.

²⁵ *Hansard*, Senate, 21 May 1980, p 2604.

number of years after the inter-governmental arrangements had been settled and the enabling legislation enacted because of baseline complications.²⁶

4.1.3 UNCLOS and offshore resources policy

Emerging Law of the Sea principles helped to shape the Commonwealth's policy towards offshore oil during the 1970s, as had occurred during the earlier evolution of the P(SL)A regime. The life of the Coalition federal Government coincided with UNCLOS III negotiations between 1976 and 1982, thereby enabling continuity in policy making to be maintained. Australian Law of the Sea policy over this time reveals the Commonwealth's increasing maturity and confidence in its interactions with other nations, as well as its growing internal authority *vis-a-vis* the state governments and industry. This authority is seen in both negotiations over the treaty text, and the conversion of its provisions into Commonwealth legislation.

4.1.3.1 Overview of UNCLOS III

The Third United Nations Conference on the Law of the Sea was "the largest, longest and most complex exercise in multilateral diplomacy ever undertaken by the U.N."²⁷ Negotiations lasted nine years, from December 1973 to December 1982, and States' Parties met 15 times. The sheer size of the UNCLOS agenda and its ambitious scope explain why the conference continued to run for such an extraordinary period.²⁸ Put quite simply, the Law of the Sea Convention sought to contemplate and establish a legal code for almost every contemporaneous dimension of oceans policy.²⁹

²⁶ Haward, *op cit* fn 1.

²⁷ A. Bergin, "Australia's Contribution to the Convention", in M. Tsamenyi, S. Bateman and J. Delaney (ed), *The United Nations Convention on the Law of the Sea: What it Means to Australia and Australian Industries* (University of Wollongong, Wollongong, 1996) pp 17-41, p 17.

²⁸ D. Anderson, "LOS Convention: Status and Prospects" (1994) 18 *Marine Policy* 494-497.

²⁹ M. Herriman, "The Law of the Sea-A Delicate Balance of Rights and Responsibilities", in D. Tarte and P. Eiser (ed), *Occasional Paper Number 7 Development of an Oceans Policy for Australia* (Australian Committee for IUCN, Sydney, 1997) pp 21-31.

On the one hand, the very ambition of LOSC ensures its strength and universality. The consensual negotiating style pursued over nine years enabled a diversity of positions to be accommodated within the final treaty text. This was especially true with respect to the exclusive economic zone (EEZ) concept.³⁰ At the same time, though, the conference was a highly politicized event. Because LOSC was also the only major international treaty not framed by drafters, the result was an unwieldingly large legal instrument that is in parts inconsistent and ambiguous.³¹

A further twelve years elapsed following the conclusion of UNCLOS III and the convention's belated entry into force. As will be discussed in the next chapter, this delay was due at least in part to the difficulties experienced by nations in satisfying such a bewildering array of rights and obligations.³² Since LOSC entered into force in 1994 nations have embraced its provisions with a fervour rarely seen in international affairs.³³ In spite of its protracted history, the Law of the Sea Convention now provides the basis for new regimes to legitimate and regulate all areas of marine policy [see Chapter Five].

³⁰ "No new principle of the law of the sea has ever been established so rapidly and of such a startlingly novel and important character." I. Shearer, "International Legal Aspects of Australia's Maritime Environment", in *Australia's Maritime Horizons in the 1980s* (Occasional Papers in Maritime Affairs: 1, 1982) pp 1-8, p 6.

³¹ *Ibid.*

³² K. Suter, *The History of the Development of the Law of the Sea - the Importance for Global Marine Conservation and Recommendations for Australian Action* (World Wildlife Fund for Nature Australia/Humane Society International, Sydney, 1994).

³³ P. Birnie, "Law of the Sea and Ocean Resources: Implications for Marine Scientific Research" (1995) 10 *The International Journal of Marine and Coastal Law* 229-251; W. Burke, "Importance of the 1982 UN Convention on the Law of the Sea and its Future Development" (1996) 27 *Ocean Development and International Law* 1-4; D. Freestone, "The Road From Rio: International Environmental Law After the Earth Summit" (1994) 6 *Journal of Environmental Law* 193-218; G. Galdorisi, "The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea?" (1996) 27 *Ocean Development and International Law* 399-408; C. Joyner and E. Martell, "Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law" (1996) 27 *Ocean Development and International Law* 73-95; A. Morgan, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action" (1996) 27 *Ocean Development and International Law* 5-29; J. Van Dyke, "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: the Straddling Stocks Negotiations" (1995) 10 *The International Journal of Marine and Coastal Law* 219-227.

4.1.3.2 Australia at the Conference

Australia's contribution to the form of the Convention has been well reported in the literature. In his doctoral work, Bergin documents how Australia was a very influential participant at the Conference, both within and without the negotiating sessions.³⁴ He remarks that –

Given that more than 150 nations attended UNCLOS III (virtually every country in the world) and that between 2000-3000 delegates attended most sessions, these judgements testify to the diplomatic skill and effort by Australia over the life of the conference. They also underscore the importance Canberra attached to the negotiations.³⁵

Other leading commentators have concurred in ranking Australia in the group of most important countries at UNCLOS III.³⁶ The Commonwealth's role at the Conference has been described varying in the following terms –

- Australia was one of six countries that achieved more 'clout' at the conference than would be expected at the international level;³⁷
- the Australian delegation had a 'high degree of respect and influence';³⁸ and
- Australia's delegation leader Keith Brennan was described as a 'pillar' of UNCLOS diplomacy.³⁹

That Australia was such an important player at the Conference is a function of the Commonwealth's objective to reach a comprehensive treaty, and its determination that no issue—especially deep seabed mining—should scuttle negotiations.⁴⁰ Whilst the Commonwealth was clearly committed to

³⁴ A. Bergin, *Australia and the Third United Nations Conference on the Law of the Sea* (The Australian National University, PhD thesis, 1990).

³⁵ Bergin, op cit fn 27 p 19.

³⁶ E. Miles, "The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea" (1977) 31 *International Organization* 159-234; J. Nye, "Ocean Rule Making from a World Politics Perspective" (1975) 3 *Ocean Development and International Law* 29-52.

³⁷ C. Sanger, *Ordering the Oceans* (University of Toronto Press, Toronto, 1987).

³⁸ Bergin, op cit fn 27.

³⁹ J. Evensen, "Three Procedural Cornerstones of the Law of the Sea Conference: The Consensus Principle, the Package Deal, and the Gentlemen's Agreement", in J. Kaufmann (ed), *Effective Negotiation Case Studies in Conference Diplomacy* (Martinus Nijhoff, Dordrecht, 1989) pp 75-92.

⁴⁰ A. Bergin, "Australia and Deep Seabed Mining" (1982) 36 *Australian Outlook* 45-50.

emplacing a new world order for the oceans, LOSC also provided timely support to the Commonwealth's efforts to finally settle offshore jurisdiction domestically.⁴¹ As such, Law of the Sea negotiations proceeded in parallel with domestic OCS developments, cognizant of how the two policy endeavours could usefully be linked. With the exception of the margin claim [discussed below] Australian goals were generally consistent with the broad thrust of the Conference. The Commonwealth did not often depart from the dominant or collective view on issues, but instead worked industriously to ensure that its policies would be absorbed within the final treaty.⁴² Australia's LOSC claims were therefore orthodox and uncomplicated, nor did the Commonwealth acted precipitously, a theme that has been repeated throughout this thesis.

4.1.3.3 *The Commonwealth's continental shelf policy*

The Commonwealth's highest—and indeed, most controversial—priority at UNCLOS III was to enhance its controls over the continental shelf. There were two components to this policy which saw Australia generally marginalised from the views of other nations: extending to the edge of the continental margin [the shelf, slope and rise] the area of continental shelf accruing to coastal States; and opposing revenue sharing for minerals extracted from this extended continental shelf.⁴³ Because the Australian continental shelf extended well beyond 200 miles in many places it was not in the Commonwealth's interests to accept a shelf delimited by reference to a fixed linear distance, as was being proposed in UNCLOS III negotiations.⁴⁴

⁴¹ Bergin, op cit fn 27.

⁴² H. Burmester, "Australia and the Law of the Sea - The Protection and Preservation of the Marine Environment", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 439-455; H. Burmester, "Australia and the Law of the Sea", in J. Crawford and D. Rothwell (ed), *The Law of the Sea in the Asia Pacific Region* (Kluwer Academic Publishers, Dordrecht, 1995) pp 51-64.

⁴³ Bergin, op cit fn 40; A. Bergin, "Australia and UNCLOS III" (1983) 29 *Australian Journal of Political History* 427-439.

⁴⁴ Australia's claim to the edge of the continental margin was consistent with the view it had advocated with increasing confidence over the preceding twenty years, and had most

Chapter Three showed that the Commonwealth had come to interpret in broad terms the definition of the continental shelf contained in the 1958 Convention. The Commonwealth distinguished the continental shelf regime from the EEZ, and saw no difficulty in extending the continental shelf to the edge of the margin where natural prolongation so allowed.⁴⁵ This definition of the continental shelf was particularly significant in relation to the emerging north west shelf oilfields, which potentially extended a considerable distance offshore.⁴⁶

Relying upon the ambulatory criteria contained in the Continental Shelf Convention—that nation State jurisdiction over the continental shelf extended to a depth of 200 metres or beyond where technology admitted of exploitation—the Commonwealth during the 1970s granted exploration permits over the wide continental shelf. Because the Commonwealth favoured the geomorphological aspects of the continental shelf it sought to have these recognised and preserved in the proposals for a new continental shelf regime.⁴⁷ The trenchant position adopted by Australia regarding the continental shelf led to the country generally being isolated on this particular matter, notwithstanding its otherwise widely supported contributions to UNCLOS III.⁴⁸

insistently advanced in the International Seabed Committee beginning in 1968 [discussed earlier in 3.3.4]. Indeed, Australia's influence in negotiations on deep seabed mining and the continental margin was attributed to its participation in the preparatory work of the Committee. See, M. Landale and H. Burmester, "Australia and the Law of the Sea - Offshore Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 390-416.

⁴⁵ Consistent with the high priority the Commonwealth placed on Law of the Sea policy, Australia in 1979 declared the Australian Fishing Zone to strengthen arguments for codifying this concept in the final treaty text. However, it appears that the Commonwealth acted to declare the AFZ more to present a unified regional South Pacific bloc to the UN than out of a desire to obtain expanded fisheries responsibilities. See: Herr and Davis, *op cit* fn 13.

⁴⁶ M. Landale and H. Burmester, "Australia and the Law of the Sea - Offshore Jurisdiction", in K. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 390-416.

⁴⁷ *Ibid.*

⁴⁸ Bergin, *op cit* fn 27.

Other wide margin States accepted the need to return to the international community some of the benefits accruing to coastal States from extended continental shelves, a policy to which the Commonwealth was opposed.⁴⁹ As a result of its isolation on the continental margin, Australia shifted its approach from one of vociferous, high profile opposition to a more moderate tactic designed to minimize the costs of extending jurisdiction further offshore.⁵⁰ As Bergin notes, Australia devoted "an enormous amount of diplomatic energy" to its margin policy.⁵¹ The Commonwealth did concede that a more precise definition of the continental shelf was needed than that contained in the 1958 Convention. Australia eventually settled on the complicated delimitation formula proposed by Ireland, even though this proposition detracted from the notion of natural prolongation, which was hitherto the basis of the Commonwealth's interpretation of the continental shelf.⁵²

Complementing the continental shelf debate was the topic of deep seabed mining. The regime for the deep seabed is important to continental shelf policy for two reasons. Firstly, the limits of the two areas are coterminous; that is, the edge of the legal continental shelf forms the boundary of the international seabed. During negotiations, Australia successfully argued that the international seabed regime could not include nor intrude upon the

⁴⁹ The final Law of the Sea Convention contains a formula specifying the royalty payments payable by coastal States to the International Seabed Authority in respect of development occurring on the continental shelf beyond 200 miles. After five years of production, a royalty of 1% of production value shall be paid by the coastal State, increasing by 1% each year to a maximum of 7% thereafter which the rate will be fixed [Article 82]. The Australian delegation did not accept that these provisions would contribute to improving aid to less developed countries, but would simply deter offshore exploitation. See: Landale and Burmester, *op cit* fn 46; J. Prescott, "Problems of Drawing Australia's Maritime Boundaries", in R. Herr, R. Hall and B. Davis (ed), *Issues in Australia's Marine and Antarctic Policies* (University of Tasmania, Hobart, 1982) pp 17-31.

⁵⁰ Bergin, *op cit* fn 27.

⁵¹ *Ibid.*

⁵² The details of this formulation are discussed in the next chapter in the context of the Convention's entry into force and the Commonwealth's legislative implementation thereof.

continental shelf, which was covered by a separate regime.⁵³ Secondly, Australia's deep seabed policy highlights the extent to which the minerals industry could influence Commonwealth decision making. Being a major producer of land-based minerals—especially nickel—the Commonwealth was wary of the risk to traditional producers of subsidised deep seabed mining.⁵⁴

For most of UNCLOS III, Australia echoed Canada's policy opposing subsidisation of minerals mined from the deep seabed. In 1980, however, the Commonwealth's well articulated position was unexpectedly reversed as a result of direct petitioning of Prime Minister Fraser. Just before the 9th session of UNCLOS, the Chairs of Western Mining and CRA approached Fraser to seek a reversal of the Commonwealth's position on seabed mining, on the grounds that this would potentially expose the market place to price distortions. Against the advice of the Department of Foreign Affairs, the Prime Minister accepted this argument and directed the Australian delegation to support subsidisation. Although this policy change was in the event shortlived the example reveals the ability of the minerals industry to influence key individuals, as recently as 1980.⁵⁵

4.1.3.4 *Explaining the Commonwealth's approach*

The Commonwealth's Law of the Sea policy needs to be interpreted in light of two broad sets of factors. The first of these relates to foreign policy and international diplomacy.⁵⁶ With the exception of the seabed regimes, Australia acted so as not to jeopardize the Commonwealth's "desire to work towards a comprehensive Law of the Sea Convention",⁵⁷ and resisted making assertive offshore jurisdictional claims. This approach was generally

⁵³ Bergin, op cit fn 43.

⁵⁴ K. Brennan, "Recent International Developments Regarding the Law of the Sea", in R. Herr, R. Hall and B. Davis (ed), *Issues in Australia's Marine and Antarctic Policies* (University of Tasmania, Hobart, 1982) pp 3-16.

⁵⁵ Bergin, op cit fn 40.

⁵⁶ Bergin, op cit fn 27.

⁵⁷ *Hansard*, House of Representatives, 13 April 1978, p 1516.

consistent with its traditional law of the sea policy, and Australia's support more generally for multi-lateral treaty making and international orders. In this respect, the integrity and continuity of the Australian delegation has already been acknowledged.

At the same time, and perhaps more importantly, the Commonwealth saw the opportunity to clarify and secure control over seabed resources, domestically as well as in the international context. The new arrangements emplaced by Fraser to foster state government input to international treaties were introduced earlier. UNCLOS III proved an early test of the efficacy of these arrangements and Fraser's New Federalism. Burmester noted at the time –

It is too early to tell what effect the new arrangements will have in practice. Their implementation will depend largely on the political commitment of any Federal Government to maintain close consultations ...In the area of international conferences, the States for the first time have had a representative attached as an adviser to the Australian delegation to the Seventh Session of the Law of the Sea Conference ...In the area of legislative implementation of treaties, it remains to be seen whether separate State and Commonwealth legislation to implement treaties will work effectively, particularly in those areas involving major Commonwealth responsibilities, such as the area of the marine environment.⁵⁸

During the pre-OCS, period the states were keen to become involved in coincidental UNCLOS III developments, with a view to availing themselves of any opportunities derived therefrom. Haward observes that state interest in Law of the Sea policy was heightened by the attention being given to marine policy domestically, and this encouraged all state governments to seek permanent representation on the Australian delegation. In the event, the Commonwealth permitted one state representative to join the delegation on a rotational basis, beginning in 1978.⁵⁹ Herr and Davis note that this

⁵⁸ H. Burmester, "The Australian States and Participation in the Foreign Policy Process" (1978) 9 *Federal Law Review* 257-283, p 282.

⁵⁹ Haward, *op cit* fn 3 pp 179-181.

concession was rather marginal, especially as the state government involved was required to meet their own costs.⁶⁰ Explanation for this attitude is found in Fraser's resolve not to negotiate with the states on UNCLOS matters, especially given his early reversal on domestic matters under the OCS [more in the following part].⁶¹

The Commonwealth also allowed the minerals resources industry some direct—albeit marginal—input to UNCLOS proceedings. At the 9th session in mid-1980, representatives from AMIC and APEA were attached to the Australian delegation to the Law of the Sea, but were included on the Commonwealth's strict terms. Writing at that time, Reid implied that this dialogue was an improved but nonetheless insufficient move –

A more belated (but nonetheless welcome) development has been a series of consultations held in Australian capital cities between the leader of Australia's delegation (Ambassador Keith Brennan) and representatives of Australia's offshore industry (both petroleum and mining interests). These meetings have provided a useful forum for an exchange of views between Government officials and industry on current developments in the international arena which will have significant implications for further Australian offshore activities.⁶²

Horizontal tensions experienced during UNCLOS III effectively limited the input of industry and state government to Australia's delegation. Negotiations raised questions within the federal government over the respective roles of portfolios, and the Department of Foreign Affairs as lead negotiating agency was able to strengthen its position relative to other agencies.⁶³ The pre-eminence of Foreign Affairs ensured that the domestic interests of state governments were kept distant from the international

⁶⁰ Herr and Davis, *op cit* fn 13.

⁶¹ P. Weller, *Malcolm Fraser PM: A Study in Prime Ministerial Power in Australia* (Penguin, Ringwood, 1989).

⁶² P. Reid, "Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone of Millstone?" (1980) 2 *Australian Mining and Petroleum Law Journal* 58-76, p 59.

⁶³ R. Boardman, *Global Regimes and Nation-States: Environmental Issues in Australian Politics* (Carleton University Press, Ottawa, 1990).

negotiating position. This in turn accounts for the emphasis given to the diplomatic aspects of law of the sea policy compared with national marine resources issues. Commonwealth bureaucratic influences were therefore more deterministic of offshore sea law policy than other political factors.

Despite Australia's concerted efforts to have its preferred continental shelf regime adopted within LOSC, the final hybrid regime to emerge at the end of 1982 was a hybrid of many opportunities. As the next chapter shows, although the regime is not ideal from Australia's perspective, the Commonwealth did fare very well from the Convention. Because LOSC was not well articulated with domestic policy developments proceeding in parallel, the Commonwealth was able to settle internal offshore arrangements without complications of an international nature arising. Put another way, the OCS was concerned solely with the details of domestic legislative arrangements while the Law of the Sea Convention provided the international parameters within which Commonwealth offshore resources policy was developed.

4.2 THE OFFSHORE CONSTITUTIONAL SETTLEMENT

4.2.1 Negotiating the OCS

In spite of the expectation of a return to a more equitable variety of intergovernmental relations under Fraser, Haward makes the point that the Offshore Constitutional Settlement was not an original element of New Federalism.⁶⁴ The OCS did, however, come to be seen as a demonstration of the Commonwealth's commitment to brokering a new offshore accord favourable to state concerns, within the framework of renewed Commonwealth/state interaction.

⁶⁴ Haward, *op cit* fn 3 pp 152, 160-163.

The public record confirms how Fraser very quickly rethought the offshore problem. Soon after being elected to office in 1976, the Prime Minister in reply to a letter from the Western Australian Premier, Charles Court, advised the latter that jurisdiction over the offshore was now settled in favour of the Commonwealth, and that sovereignty in respect of the territorial sea was not negotiable.⁶⁵ The letter read in part –

I have received similar approaches from the Premiers of Victoria and Tasmania. I am writing now to inform you that the important question thus raised has now been considered by the Commonwealth Government. The position of the Government is that it regards the High Court decision in the Seas and Submerged Lands Case, that sovereignty over the territorial sea is vested in the Commonwealth and not in the States, as having settled the general issue of sovereignty over the territorial sea. In taking this position my government has had regard to the advice it has received from its law officers that the Commonwealth Government could not legally accede to the States' requests.⁶⁶

In remarkably short time, however, the Commonwealth had retreated from this position and commenced negotiations with the states to return to this sphere of government some offshore powers and functions. That Fraser did so rapidly reverse the Commonwealth's stated position with respect to the offshore was invoked repeatedly by the Labor Opposition as evidence of the Government's weakness in interacting with the states. It is now a matter of Australian political and legal history that the territorial sea was returned to the states under the OCS.⁶⁷ Less well recognized, though, is that the

⁶⁵ Reid, *op cit* fn 62.

⁶⁶ *Hansard*, House of Representatives, 1 May 1980, p 2524.

⁶⁷ M. Crommelin, "Federal-Regional Cooperation: A Comparative Perspective", in J. Saunders (ed), *Papers presented at the 2nd National Conference on Natural Resources Law, 1985 Managing Natural Resources in a Federal State* (Carswell, Calgary, 1986) pp 295-321; Cullen, *op cit* fn 18; B. Davis, "National Responses to UNCED Outcomes: Australia", in L. Kriwoken, M. Haward, D. VanderZwaag and B. Davis (ed), *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International, London, 1996) pp 25-40; N. Evans, "LOSC, Offshore Resources and Australian Marine Policy" (1996) 20 *Marine Policy* 223-227; M. Haward, "The Offshore", in B. Galligan, O. Hughes and C. Walsh (ed), *Intergovernmental Relations and Public Policy* (Allen and Unwin, Sydney, 1991) pp 109-128; R. Kenchington, *Managing Marine Environments* (Taylor & Francis, New York, 1990); D. Rothwell, "The Legal Framework for Ocean and Coastal Management in Australia" (1996) 33 *Ocean and Coastal Management* 41-61.

Commonwealth retained for itself the capacity to prevail in offshore decisions—as acquired pursuant to the *Seas and Submerged Lands Act*—while readmitting the states to a substantial role in resources policy and administration. As will become apparent, while the Commonwealth equivocated in negotiations on some matters of policy—such as fisheries management—it vetoed state proposals in respect of other priority areas such as the Great Barrier Reef.

Haward recounts the constant high level interaction between the Commonwealth and the states—typically at the prime minister-premier level—over the several years following the change of federal government.⁶⁸ Through multiple political and bureaucratic iterations broad agreement had been reached by late 1977 as to the principles of the framework that would become the Offshore Constitutional Settlement. At this preliminary stage, the mechanisms which would enable enactment of the OCS legislation were first canvassed [discussed further in the next section]. As stated, the most urgent concern of state governments was to recoup from the Commonwealth jurisdiction over the territorial sea. The OCS also established regimes wherein state governments would participate in decision making for marine resources located in Commonwealth waters beyond. Examples of the latter arrangements include the role of states in fisheries, minerals and petroleum regimes.⁶⁹

The most difficult offshore arrangements to be settled were those applicable to the fishing sector. Unlike the situation with offshore petroleum,

⁶⁸ Haward, *op cit* fn 3 pp 160-178.

⁶⁹ A comprehensive description of the OCS agreed arrangements is found in Haward, *op cit* fn 1. It is worth individually highlighting the legislative regime for offshore minerals enacted in 1981 as part of the OCS. The *Minerals (Submerged Lands) Act 1981* (Cth) was passed by the Commonwealth Parliament without difficulty, based heavily upon the P(SL)A. However, the legislation was not proclaimed and did not come into force for another ten years. The M(SL)A was repealed and replaced with new laws in 1994 as part of the Commonwealth's response to the entry into force of the Law of the Sea Convention [see Chapter Five].

where activity was limited to just two adjacent states, all state governments had interests in managing commercial fisheries, the precise situation that had occurred 30 years earlier. This diversity of state interests in respect of fisheries frustrated the conclusion of OCS fishery arrangements, a topic returned to in Chapter Five.⁷⁰

The state governments also insisted that a formal written agreement, the OCS document, should accompany the arrangements eventually reached.⁷¹ The reason that states such an agreement stemmed from the persistent delays encountered in finalizing agreed arrangements in some sectors, and enacting the necessary legislation. While the basis for some of these delays were the complicated constitutional issues associated with the offshore framework being developed, difficulties were encountered in relation to technical details in baseline drawing, and policy matters such as the residual role of the Commonwealth after readjustment of inter-governmental functions.

It was not until the 1979 Premier's Conference that the OCS was finally endorsed by heads of government. A comment made by Fraser soon thereafter encapsulates not only the essence of the new settlement but the various influences upon its form –

There have been arguments over the last ten, twelve or fourteen years that have been difficult for the Liberal Party and for the nation; offshore sovereignty and High Court cases which gave authority to the Commonwealth. It would have been possible to say to Dick Hamer in relation to Bass Strait, or to Sir Charles Court in relation to the North-West Shelf: 'Well, the Courts have given us sovereignty and we are going to exercise it totally. Our Department of National Development will move out into the states and you can get out of this area. Is is of no concern to you!' This is precisely what the Labor Party has said that they will do. But we have set about in a painstaking way to negotiate a set of agreements on mining, drilling, fishing and the management of resources offshore. We have come to an agreement with all the states—

⁷⁰ See: Anon., "OCS now extends to five States" (1987) 46 *Australian Fisheries* 16-17. M. Haward, "The Commonwealth in Australian Fisheries Management: 1955-1995" (1995) 2 *The Australasian Journal of Natural Resources Law and Policy* 313-325.

⁷¹ *The Offshore Constitutional Settlement: A milestone in cooperative federalism.* (Australian Government Publishing Service, Canberra, 1980.

Labor and Liberal—in a truly historic set of documents which have established agreement. We have done this without having to go to a referendum. We have done it without dispute. We have done it in a way which establishes a common sense relationship between the administration of the states and of the Commonwealth.⁷²

A few close observers of the offshore saga have remarked that the Commonwealth under Fraser was confronted with the reality of assuming sole administrative and technical responsibilities over vast offshore areas.⁷³ As recounted in the previous chapter particularly, although federal expertise with respect to offshore petroleum had improved over the intervening years the Commonwealth was still incapable of assuming exclusive jurisdiction for administering the resources of the continental shelf. At the same time, state governments were restless to regain offshore identity and capability. It was the merging of these two positions, as much as the espoused New Federalism policy, that profoundly shaped the final form of the OCS.

Within the fabric of this national mood, strong support for the OCS emanated from a number of influential individuals involved in negotiations, at both official and ministerial level. With respect to the former, solicitors-general of both spheres of government, and the Standing Committee of Attorneys-General, were especially crucial in translating the outcome of OCS negotiations into a coherent legislative framework.⁷⁴ More fundamental to the OCS was the influence of several key ministers, especially the premiers of Queensland and Western Australia, those states most desperate to readjust offshore relations. The role played by Premiers Court

⁷² M. Fraser, "The Commonwealth and the States", in D. White and D. Kemp (ed), *Malcolm Fraser on Australia* (Hill of Content, Melbourne, 1981) p 156.

⁷³ Evans and Bailey, op cit fn 4; Opeskin and Rothwell, op cit fn 4.

⁷⁴ The Minister for Home Affairs was moved to effuse in Parliament that – "I cannot conclude without expressing particular appreciation of the efforts of the Standing Committee of Attorneys-General ... The Standing Committee and its legal advisers have carried out that brief with great success, all the more gratifying in that it was accomplished in a spirit of frankness and goodwill. I should also express particular thanks to the Parliamentary Counsel concerned for drafting the history-making legislation involved. I also thank officers of the Attorney-General's Department who were involved. *Hansard*, House of Representatives, 23 April 1980, p 2171.

and Bjelke-Petersen is revealed by the extent and intensity of debate in Parliament of the OCS.

Several key Opposition figures were scathing about the OCS and the state governments' ability to shape the new offshore accord. Most notable amongst these opponents was then shadow minister for minerals and energy, Paul Keating, who like Whitlam before him led the attack on the Coalition's offshore policy and went on to become prime minister. During debate on the enabling legislation, Keating attacked the prime minister for being persuaded by Court and Bjelke-Petersen to return the territorial sea to the states against his original undertaking –

Attempts by the recalcitrant State Premiers, Sir Charles Court and Mr Bjelke-Petersen, to overturn or to circumvent the High Court decision should have been treated with disdain. The subsequent policy of the Commonwealth represents an about-face, particularly by the Prime Minister from the position he held in late 1976.⁷⁵

Similar attacks were repeated by the Labor Opposition in the Senate. Peter Walsh, later to become resources minister under the subsequent Labor Government, accused Fraser of acquiescing to the state premiers –

Now we find that Mr Fraser has reversed his position. Why would Mr Fraser reverse absolutely the position he held three and a half years ago? The reason is that he is a coward ... the historical record shows that every time a confrontation occurs between Charles Court, Bjelke-Petersen and the Prime Minister, the Prime Minister caves in.⁷⁶

The premiers of Queensland and Western Australia were motivated to protect marine policy interests peculiar to their respective states. The priority in the case of Western Australia was offshore oil, as it was for Victoria, notwithstanding that the latter state was being displaced as the primary prospective offshore area. As the only oil-producing states, these governments therefore had the most to regain in terms of offshore title and a

⁷⁵ *Hansard*, House of Representatives, 1 May 1980, p 2531.

⁷⁶ *Hansard*, Senate, 21 May 1980, p 2616.

decision making role within the new Commonwealth regimes. The premiers of these states were persistent and forceful in OCS negotiations, especially Premier Court, who was able to extract a regime tailored to Western Australia [more in part 4.3]. On the other hand, because Victoria and Western Australia alone had interests in seabed prospectivity these states could not rely upon the diversity and unanimity of a state bloc to prevail in negotiations with the Commonwealth, as was the case with fisheries management.

Queensland's issue of concern was jurisdiction over the Great Barrier Reef. In his thesis, Haward recounts the Commonwealth's resolve to retain intact Whitlam's *Great Barrier Reef Marine Park Act*, in spite of the return to the states of jurisdiction offshore to three miles.⁷⁷ The Emerald Agreement was finally reached in mid-1979, wherein the GBRMP Act would apply unchanged to the Great Barrier Reef. The concession to Queensland was the creation of a ministerial council—the preferred inter-governmental mechanism in Australia—involving the relevant Commonwealth and Queensland ministers responsible for setting broad policy. With this agreement, the first section of the marine park was proclaimed following the drawing of baselines around the reef.⁷⁸

The Emerald Agreement was not reached without difficulty and cost, however. Over the course of several years, Fraser became increasingly impatient with Queensland's intransigence to finalize the Great Barrier Reef component of the OCS.⁷⁹ From the public record, the Commonwealth's resolve to retain control over the Great Barrier Reef is unmistakable, a rare point on which it was supported by the Labor Opposition.⁸⁰ As a result of these polarised, resolute views, the relations between the prime minister and

⁷⁷ Haward, *op cit* fn 3 pp 180-185.

⁷⁸ R. Kenchington, *Managing Marine Environments* (Taylor & Francis, New York, 1990).

⁷⁹ A. Gilpin, *The Australian Environment* (Sun Books, Melbourne, 1980).

⁸⁰ *Hansard*, House of Representatives, 23 April 1980, p 2171; 1 May 1980, pp 2530-2531.

Premier Joh Bjelke-Petersen became strained to the extent that these government leaders often sent senior officials to meetings in their stead.⁸¹

Finally, it is important to again note the distinction between Labor's attitude in the Commonwealth sphere and the view of Labor state governments. While the federal Labor Opposition considered the scheme as the wholesale destruction of Whitlam's grand design the two states under Labor governments supported the OCS.⁸² As with the case of the 1967 Settlement, this inconsistency between Commonwealth and state Labor views was seized upon by the government as both testimony of the credibility of its scheme, and to highlight the Opposition's desires of exercising exclusive Commonwealth jurisdiction over the offshore. These sentiments were amply reflected in the words of the Minister for Science and the Environment –

The Labor Party has been embarrassed by two State Labor governments which have recognised the crass stupidity of the Labor Party's platform, and which recognise the fairness and the correctness of this Federal Government's approach ... The fact is that the Labor Party's policy is so stupid that it has been thoroughly thrown out by two State governments of the Labor Party's own political persuasion.⁸³

4.2.2 The Coastal Waters legislation

The OCS returned jurisdiction over the territorial sea to the states by creating for the first time a Commonwealth/state divide three miles offshore. From the aggregation of High Court judgements and extant legislative provisions it was recognised that title and power with respect to offshore areas were different legal constructs, and could be treated separately without necessarily being in conflict. The separation of jurisdiction into two discrete components was the avenue seized by the Commonwealth and the states to give effect to

⁸¹ Haward, *op cit* fn 3 pp181-182.

⁸² *Hansard*, House of Representatives, 23 April 1980, p 2169; 1 May, p 2582. See: Haward, *op cit* fn 1.

⁸³ *Hansard*, House of Representatives [David Thomson, Minister for Science and the Environment], 1 May 1980, p 2529.

the OCS. The two elements to the formative framework were therefore empowering the states to legislate to a distance three miles offshore, and extending their limits over this same area.

Several avenues through which these two fundamental requirements could be met were originally considered, including –

- amending the SSLA to achieve the policy intention of the OCS;
- a national referendum under section 128 of the Constitution to vest jurisdiction over the territorial sea in the states;
- constitutionally extending state boundaries three miles offshore [s 123];
- enacting quitclaim legislation based upon the external affairs power [s 51(xxix)]; and
- legislating pursuant to the request power [s 51(xxxviii)], the mechanism eventually relied upon.

All governments, state and federal, were reluctant to rely upon a constitutional referendum to reverse *New South Wales v the Commonwealth* because of its high likelihood of failure.⁸⁴ As discussed further below, an important factor in this regard was the federal Labor Opposition's continued support for the *Seas and Submerged Lands Act*, and its vow to dismantle the OCS upon re-election to government. The states were opposed to simply amending the SSLA because of its vulnerability to future amendment or repeal.⁸⁵ To satisfy these many demands a legislative package consisting of fourteen Commonwealth Acts, as well as supportive state legislation, was needed.⁸⁶

⁸⁴ Reid, op cit fn 62.

⁸⁵ Haward, op cit fn 3 pp 187-191.

⁸⁶ In addition to the principal statutes discussed in-text, a number of Commonwealth Amendment Acts were passed to give effect to the Offshore Constitutional Settlement and create a consistent jurisdictional framework. Legislation amended to this end included Acts governing fisheries, navigation, shipwrecks and pipelines, as well as the *Petroleum (Submerged Lands) Acts*.

The OCS hinges upon two key statutes known as the Coastal Waters legislation. The *Coastal Waters (State Powers) Act* 1980 (Cth) confers upon states extra-territorial legislative powers with respect to their coastal waters, which are defined in the Act as being internal waters and the three-mile territorial sea adjacent to each state.⁸⁷ Whilst the term "coastal waters" encapsulates two bodies of water, it was introduced to also enhance the association between coastal waters and the adjacent state, thereby obviating the international dimension of the territorial sea as embodied in the SSLA.⁸⁸ The operation of the *State Powers Act* was importantly limited to three miles in the event of the territorial sea being expanded for international purposes.⁸⁹

At the time of its enactment the *Coastal Waters (State Powers) Act* engendered considerable academic debate. The Preamble to the Act refers unusually to the constitutional head of power upon which it is based. The head power in question, section 51(xxxviii) of the Constitution, relates to the enactment of legislation by the Commonwealth at the request, or with the concurrence, of the states. That is, the power to enact federal legislation pursuant to this section of the Constitution is driven by the states.⁹⁰

During negotiations, opinions across all jurisdictions narrowed upon the request power for the legal and political reasons outlined above. Officials and legislators held very real concerns as to the efficacy of the s 51(xxxviii) mechanism, which had hitherto never been used to support legislation.⁹¹ Every state Parliament in 1979 nonetheless enacted legislation couched in the

⁸⁷ *Coastal Waters (State Powers) Act* 1980 (Cth) ss 5, 3(1). See, D. Rothwell and M. Haward, "Federal and International Perspectives on Australia's Maritime Claims" (1996) 20 *Marine Policy* 29-46.

⁸⁸ Cullen, op cit fn 2.

⁸⁹ *Coastal Waters (State Powers) Act* 1980 (Cth) s 4(2).

⁹⁰ The precise wording of s 51(xxxviii) is found in the discussion of the Constitution in Chapter Two.

⁹¹ Anon., "Distribution of Offshore Constitutional Responsibilities Between the Commonwealth and States" (1979) 53 *The Australian Law Journal* 605-606; Hansard, House of Representatives, 23 April 1980, p 2167.

terms of the s 51(xxxviii) head power, requesting the Commonwealth to legislate to vest in the states jurisdiction over coastal waters.⁹² The intention of the *State Powers Act* is expressed by the Prime Minister during Parliamentary debate on the OCS –

This Bill is one of an historic package of Bills which will be introduced today to give legislative effect to the off-shore settlement reached at the Premiers Conference in June last year. The implementation of the off-shore settlement represents a great milestone in Commonwealth-state relations ... The present Bill—the Coastal Waters (State Powers) Bill—is the cornerstone of the package. It is being introduced in response to legislation that has been recently enacted in each of the States requesting the passage by the Commonwealth Parliament of such a Bill ... Those Bills provide the legal basis for State rights and activities in the off-shore area. This is on the basis that the territorial sea is an area best left for local jurisdiction—except on matters of over-riding national or international importance.⁹³

The companion statute to the powers legislation is the *Coastal Waters (State Title) Act* 1980 (Cth). The *State Title Act* appears to be based upon the external affairs head of power, relying upon the geographical interpretation of this power provided in *New South Wales v the Commonwealth*.⁹⁴ Chapter Two introduced the strict formula for altering state boundaries that are spelled out in the Constitution. Because of these constitutional limitations the *State Title Act* is constructed so as not to claim adjacent seabeds as state territory. Notwithstanding this explicit limitation, there are convincing arguments that state boundaries have been extended offshore as a consequence of the *State Title Act*, as canvassed in the following section.

To avoid attracting these constitutional restrictions, the *State Title Act* vests in states proprietary rights and title over the seabed and water column

⁹² The Western Australian legislation was the *Constitutional Powers (Coastal Waters) Act* which was also prefaced by a lengthy Preamble that attempted to forge a connection between the Commonwealth statute, the OCS and the constitutional head of power. Similar request legislation appeared in other State Parliaments, thus satisfying the constitutional requirements for the Commonwealth to enact the *Coastal Waters (State Powers) Act*.

⁹³ *Hansard*, House of Representatives, 23 April 1980, p 2165.

⁹⁴ Crommelin, *op cit* fn 2.

of coastal waters as if this area was within state boundaries.⁹⁵ However, granting title over coastal waters without altering the geographical limits of states meant that the ability of state parliaments to legislate over these same waters was doubtful. The *State Powers Act* therefore operates to fill the possible legal vacuum left by the creation of sovereign title alone under the *State Title Act*.⁹⁶ It was the titles legislation that was considered to provide certainty to offshore interests, as stated by the Minister for Home Affairs during the second reading speech –

The Bill, when proclaimed to come into force, will vest in each of the States proprietary rights and title in respect of land beneath the coastal waters adjacent to the State and within the sovereignty of the Commonwealth ... the present Bill, by conferring rights of ownership on the States, will support the grant of legislative powers to the States in the off-shore area and provide an assurance to the States that the settlement will have permanency and stability.⁹⁷

As the following section shows, the *State Title Act* ensured that the OCS was unable to be reversed, as was intended.

4.2.3 Altering the OCS legislation

Second only to the states' endeavours to have returned to them jurisdiction over the territorial sea was the requirement that this return should be irreversible. Premier Court had explicitly raised this issue at the 1978 Premiers' Conference.⁹⁸ The Labor Opposition had made clear in Parliament its intention to reclaim Commonwealth jurisdiction over the territorial sea when it was elected to office in the future, as it had done in 1973 upon election of the Whitlam Government. The OCS would likely have withstood a legal assault of this kind because of the complex construction of the new settlement. Part of this resilience was due to section 51(xxxviii) of the

⁹⁵ *Coastal Waters (State Title) Act* 1980 (Cth) s 4(1).

⁹⁶ Cullen, op cit fn 18 pp 110-112.

⁹⁷ *Hansard*, House of Representatives [Robert Ellicott, Minister for Home Affairs], 23 April 1980, p 2171.

⁹⁸ *Hansard*, House of Representatives, 1 May 1980, p 2526.

Constitution, the head of power upon which the *Coastal Waters (State Powers) Act* was enacted.

As mentioned, prior to passage of the *State Powers Act* this head of power had never before been used by the Commonwealth to enact legislation.⁹⁹ It was accepted by the Commonwealth that in the event of a court challenge this untried Constitutional power might not uphold every provision of the *State Powers Act*.¹⁰⁰ Nonetheless, this approach was preferable to the doubtful prospect of a constitutional referendum succeeding, the other likely form of recourse for the return to states of coastal waters.¹⁰¹ The Coalition Government's refusal to seek popular endorsement of the OCS through a referendum was one of several matters that most offended Labor, especially given the radical redefining of Commonwealth and state offshore jurisdiction that this achieved. As the shadow Attorney-General, Lionel Bowen, stated –

That is the reason why this Government is so anxious to put this legislation through; not in the national interest, but on the basis that we would have a de facto alteration of the Constitution without consulting the people of Australia ... There is no right or propriety to think that this Government will alter the Constitution of Australia on the basis that this is a request from Sir Charles Court ... This is an attempt to bind a future Labor government without any reference to the Australian people.¹⁰²

Legal commentaries echoed these doubts as to the method of legislating, that is, relying upon the request head of power rather than seeking public

⁹⁹ Section 51(xviii) of the Constitution has only been used once since the *Coastal Waters (State Powers) Act*, in equally unusual circumstances. The head power was used to enact the *Australia Act 1986* (Cth) which was part of a three-way legislative arrangement involving the U.K. Parliament, the Commonwealth and the Australian states, the purpose of which was to effectively sever all pre-federation legal ties with Great Britain.

¹⁰⁰ Anon., "Distribution of Offshore Constitutional Responsibilities Between the Commonwealth and States" (1979) 53 *The Australian Law Journal* 605-606.

¹⁰¹ M. Crommelin, "Petroleum (Summerged Lands) Act: The Nature and Security of Offshore Titles" (1979) 2 *Australian Mining and Petroleum Law Journal* 135-159; R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (The Federation Press, Sydney, 1990).

¹⁰² *Hansard*, House of Representatives, 1 May 1980, 2536-7.

endorsement through a referendum. An editorial written at the time opined that –

... with all due respect to the Government and to the Attorney-General, the reliance on s. 51, pl. (xxxviii) of the Constitution for the validity of certain of the Acts seems to be something of a gamble, for quaere whether s. 51, pl. (xxxviii) was intended to confer powers of so far reaching a nature as to bring about a radical restructuring of Commonwealth and State constitutional responsibilities, without recourse to the power of amendment of the Constitution conferred by s 128.¹⁰³

Clearly, there were serious doubts clouding enactment of the legislation. In order to undo the OCS, moreover, the Commonwealth had to consider whether the *State Powers Act* could be repealed without state request legislation under section 51(xxxviii) of the Constitution. It is possible that because the *Coastal Waters (State Powers) Act* finds its origin in extraordinary state legislation, then similar legislative action by the states is needed to repeal the Act.¹⁰⁴ The counter argument is that once enacted, the *State Powers Act* is no different to any Commonwealth law and is subject to normal parliamentary processes of amendment.¹⁰⁵ To be sure, any statute that is beyond the power of the legislature to deal with subsequent to enactment is a legislative peculiarity.¹⁰⁶ The *State Powers Act* is an unusual statute, of course. On balance, it seems that the ambit of the s 51(xxxviii) head of power is clarified by its emphasis on the requirement for state request legislation. Without the necessary state requests, it is possible that the Commonwealth has no constitutional source upon which to base repeal of the *Coastal Waters (State Powers) Act* because the authority to legislate was exhausted with passage of the original statute.

¹⁰³ Anon., op cit fn 91 p 518.

¹⁰⁴ Crommelin, op cit fn 2; Cullen, op cit fn 2.

¹⁰⁵ *Hansard*, Senate 21 May 1980, pp 2612-13. See: Cullen, op cit fn 18 pp 112-116.

¹⁰⁶ Crommelin, op cit fn 101.

In addition to the question of repealing the *State Powers Act*, the Labor Opposition also contemplated the validity of the statute. The essence of this argument is that s 51(xxxviii) may be relied upon to enact legislation at the request of the states in relation "to the exercise within the Commonwealth of the power in question". As has been seen, a series of successive High Court judgements had determined unequivocally that offshore waters were outside the boundaries of the Commonwealth. The *Coastal Powers Act* therefore applied to waters that were not within the limits of the Commonwealth but in respect of which legislation could be enacted to operate with extra-territorial application. Gareth Evans, an Opposition senator who was to become attorney-general under the next Labor Government, rejected the validity of the legislation on the ground that s 51(xxxviii) could only be used to support legislation enacted within the Commonwealth –

...I suggest that it is very difficult indeed to argue that this is to be regarded as an exercise of power within the Commonwealth, under the proper meaning of section 51 (xxxviii). In any challenge to this legislation—I can assure the Government that such a challenge can be expected, certainly if Labor returns to power federally—it will certainly be argued that the legislation is unconstitutional on that ground alone.¹⁰⁷

The legal and constitutional situation with respect to the *Coastal Waters (State Title) Act* is less arcane as this statute is not sourced in the same extraordinary state request legislation. The issue here is generally not so much the Commonwealth's ability to repeal the statute than it is the compensation that may be payable as a result thereof. In other words, repealing the *State Title Act* may amount to an acquisition of property by the Commonwealth, thereby entitling states to compensation on just terms as specified in s 51(xxxi) of the Constitution.¹⁰⁸

¹⁰⁷ *Hansard*, Senate, 21 May 1980, p 2610. See also: House of Representatives, 1 May 1980, p 2527.

¹⁰⁸ Cullen, *op cit* fn 18 pp 119-122.

Less clear, though, is what "just terms" implies with respect to acquisition of the states' coastal waters. Monetary compensation for the loss of coastal waters could be staggering if just terms equated to the economic value of resources located within state waters around the Australian coastline, if this value could even be imputed. The opposite position has also been suggested. That is, because states only acquired rights over coastal waters under the *State Title Act* repealing this statute would not result in any loss requiring compensatory action by the Commonwealth.¹⁰⁹ Another scenario involves the alienation by the state of any title over coastal waters granted pursuant to the *State Title Act*, the situation that arises whereby state governments award to a developer title over a portion of state waters. The subsequent reacquisition of those waters by the Commonwealth would render the latter liable to pay just terms compensation to the title holder, regardless of any liability payable to the state as argued above.¹¹⁰

For these constitutional reasons, the vesting in states of proprietary rights and title to the seabed under the *State Titles Act* was considered to render the OCS irreversible, a result Labor found "particularly objectionable".¹¹¹ Rothwell and Haward concur in noting that the grant of title to the states represents probably the most irreversible part of the Offshore Constitutional Settlement.¹¹² It is therefore somewhat surprising that the head of power upon which the titles legislation is enacted is left unclear. During Parliamentary debates, the relevant provision was suggested to be the external affairs power, or even the "emerging concept of inherent powers associated with the Commonwealth status as a sovereign national entity."¹¹³

¹⁰⁹ *Hansard*, Senate 21 May 1980 p 2613; Cullen, op cit fn 2.

¹¹⁰ *Hansard*, House of Representatives, 1 May 1980, p 2527. See also: Reid, op cit fn 62.

¹¹¹ *Hansard*, Senate, 21 May 1980, p 2611.

¹¹² Rothwell and Haward, op cit fn 87.

¹¹³ *Hansard*, Senate, 21 May 1980, p 2611.

The absence of an identified head of power generated a final legal issue relating to the *State Titles Act* namely the ability of the Commonwealth to divest itself of title over the territorial sea. Labor Senator Evans—who proved himself to be a most learned and skillful protagonist of the OCS legislation—explained the problem in the following terms –

The basic threshold question here is: Does the Commonwealth have a proprietary right to the seabed of a kind that it can now give away because the seabed is not part of the Commonwealth itself? ... It is a matter of argument—I put it no higher than this—rather than a matter of assertion or a matter of assumption whether the Commonwealth has the authority to engage in the kind of proprietary divestiture which is purported to be accomplished here.¹¹⁴

Quite simply, the complexity of the bipolar OCS potentially exposed the Commonwealth and developers to a new array of unasked legal questions.

4.2.4 The OCS in review

The OCS was obviously very complex—perhaps necessarily so—because it had to satisfy so many legal and political considerations. Its design also reflects the requirement that no government alone could dismantle the new jurisdictional settlement.¹¹⁵ Even so, doubts persisted regarding the durability of the accord.¹¹⁶ The OCS framework was described at the time as being only another chapter in the struggle for control of offshore resources.¹¹⁷ Comment on the OCS has tended to focus upon highly specialized questions of law, and messages as to the legislation's efficacy are mixed. On the one hand, the Commonwealth was willing to return to the states jurisdiction over the territorial sea, and encouraged these governments to participate in offshore

¹¹⁴ *Hansard*, Senate, 21 May 1980, p 2611.

¹¹⁵ Cullen, *op cit* fn 2.

¹¹⁶ K. Orchison, "Petroleum Exploration Offshore", in *Australia's Maritime Horizons in the 1980s* (Occasional Papers in Maritime Studies, Australian Centre for Maritime Studies, Canberra, 1982) pp 66-71.

¹¹⁷ R. Argyle, "Governmental Powers Over Petroleum Recovery Rates-Offshore Western Australia" (1983) 15 *The University of Western Australia Law Review* 14-32; Reid, *op cit* fn 62.

resource regimes located in Commonwealth waters beyond.¹¹⁸ However, Fraser was initially determined not to cede jurisdiction, and appears to have done so on well defined terms, preserving to the Commonwealth superiority in matters of national significance.¹¹⁹ A number of provisions of the *Coastal Waters (State Powers) Act* 1980 (Cth) illustrate this point.

Firstly, the *State Powers Act* stated that the law-making capabilities given thereby to states were not to be exercised inconsistently with any Commonwealth law, a provision resting on the federal supremacy clause of the Constitution [s 109].¹²⁰ The inclusion of this provision ensured that the Commonwealth's capabilities to legislate with respect to the territorial sea were not hindered by the OCS. No other powers arrangements would be altered, and in all respects normal Commonwealth paramountcy applied regardless of state legislative capabilities over coastal waters granted by the *State Powers Act*.¹²¹

The Commonwealth's paramount position is also supported by amendments to the *Seas and Submerged Lands Act* 1973 (Cth). In order for the jurisdictional arrangements of the OCS to be implemented, some change to the *Seas and Submerged Lands Act* was needed to dispose of the legal difficulties presented by *New South Wales v the Commonwealth*. When enacted in 1973, the *Seas and Submerged Lands Act* preserved as effective all state laws except for those that dealt with offshore sovereignty and sovereign rights over resources, which were by declaratory assertion vested in the Commonwealth.¹²²

¹¹⁸ *Hansard*, House of Representatives, 1 May 1980, p 2537.

¹¹⁹ Haward, op cit fn 1; Haward and Smith, op cit fn 8.

¹²⁰ *Coastal Waters (State Powers) Act* 1980 (Cth) s 7(c).

¹²¹ *Hansard*, House of Representatives, 1 May 1980, p 2167.

¹²² *Seas and Submerged Lands Act* 1973 (Cth) s 16(1)(b) read, in part "The preceding provision of the Part do not limit or exclude the operation of any law of a State ... except in so far as the law is expressed to vest or make exercisable any sovereignty or sovereign rights ...".

To give effect to the OCS, the SSLA was amended awkwardly to declare that state legislation passed under the framework created by the *Coastal Waters (State Powers) Act* was not to be treated as invalid under the former statute.¹²³ As was mentioned earlier, Fraser originally favoured amending the SSLA in this fashion to underpin the OCS, until state premiers insisted that a more permanent basis be emplaced. In strictly legal terms, the situation presented by the amended SSLA is highly confusing.¹²⁴ More importantly, the construction of this legislation implies that rather than surrendering to states sovereignty over the territorial sea, the Commonwealth retains jurisdiction which it chooses not to exercise.¹²⁵

A final point of the *Coastal Waters (State Powers) Act* relating to the paramount role of the Commonwealth is found in its international dimension. At the time that the OCS was being formalized, the international community was contemplating approving twelve mile territorial seas through the treaty being negotiated at UNCLOS III. As discussed earlier, the Commonwealth was purposeful in keeping the two policy developments separate, notwithstanding the significant domestic implications of the LOS Convention. So successful was this approach that parliamentary debates on the OCS scarcely referred to Law of the Sea policy.¹²⁶ Moreover, the *State Powers Act* expressly limited the breadth of the Australian territorial sea to three miles for the purposes of domestic jurisdiction, even in the event of the breadth being expanded to twelve miles for international purposes.¹²⁷ The

¹²³ *Seas and Submerged Lands Act* 1973 (Cth) s 16(2) reads, in part "A law of a State ... shall not be taken to be within the words of exception in paragraph (b) of sub-section (1) if the law is otherwise within powers with respect to particular matters that are conferred on the legislature of the State ... by the *Coastal Waters (State Powers) Act* 1980 ...".

¹²⁴ Crommelin, *op cit* fn 2.

¹²⁵ G. Bates, *Environmental Law in Australia* (Butterworths, Sydney, 1992); R. Hildreth, "Managing Ocean Resources: New Zealand and Australia" (1991) 6 *International Journal of Estuarine and Coastal Law* 89-126.

¹²⁶ *Hansard*, Senate, 21 May 1980, p 2612.

¹²⁷ *Coastal Waters (State Powers) Act* 1980 (Cth) s 4(2). See: H. Burmester, "Australia and the Law of the Sea", in J. Crawford and D. Rothwell (ed), *The Law of the Sea in the Asia Pacific Region* (Kluwer Academic Publishers, Dordrecht, 1995) pp 51-64.

Commonwealth was clearly reluctant to allow the anticipated additional area of coastal waters to accrue to the states.¹²⁸ Opeskin and Rothwell comment that –

This provision (of the *Coastal Waters (State Powers) Act*) clearly contemplated a future extension of Australia's territorial sea and sought to avoid the expansion of state legislative jurisdiction beyond 3 miles in that event.¹²⁹

Several provisions of the *Coastal Waters (State Title) Act* reinforce the observation that the Commonwealth returned offshore jurisdiction to the states selectively. The long title of the *State Titles Act* acknowledges that coastal waters are within Commonwealth sovereignty, a provision that would appear to complement the amended SSLA.¹³⁰ More significantly, title over the Great Barrier Reef—the subject of protracted dispute between Queensland and the Commonwealth—remained with the Commonwealth in spite of the return to states of the three-mile territorial sea.¹³¹ The New Federalism policy continued to apply to environmental protection more generally, however, and the other environmental statutes enacted by the Whitlam Government were amended to remove much of their potential application to areas of state decision making.¹³² The obligations placed upon government authorities still affected by these environmental laws—Commonwealth agencies, basically—were also diluted from the original enacted versions. The net effect of these amendments was the

¹²⁸ Herr and Davis, *op cit* fn 13.

¹²⁹ Opeskin and Rothwell, *op cit* fn 4 p 409.

¹³⁰ *Ibid.*

¹³¹ *Coastal Waters (State Title) Act* 1980 (Cth) s 4(3) declared that rights and title created pursuant to the *Great Barrier Reef Marine Park Act* 1975 (Cth) continued to operate unaffected by the OCS legislation, preserving to the Commonwealth effective ownership of the reef region. See: *Hansard*, House of Representatives, 23 April 1980, p 2171. J. Prescott, *op cit* fn 49.

¹³² Boardman, *op cit* fn 63; M. Crommelin, "Commonwealth Involvement in Environment Policy: Past, Present and Future" (1987) 4 *Environmental and Planning Law Journal* 101-112.

Commonwealth's continued control over the Great Barrier Reef matched by a more general withdrawal from environmental policy matters.¹³³

Another point to arise from the *State Title Act* concerns the establishment of straight baselines around Australia.¹³⁴ The drawing of baselines to form the inner limit of the territorial sea is very important in apportioning offshore areas in both the national and international sense. The further seaward that these baselines are drawn the greater is the area of sea that falls under state jurisdiction.¹³⁵ By drawing baselines far from the coastline, however, the Commonwealth risks incurring the opprobrium of the international community.

The LOS Convention being concluded in concert with the OCS updated the formula for baseline drawing contained in the 1958 Territorial Sea Convention. There were two notable departures between the two treaties, though, which assisted the Commonwealth with its offshore claims. The 1982 Convention dropped the earlier requirement restricting the drawing of straight baselines to low-tide elevations only where permanent installations had been erected. Also dropped was the older criterion requiring that baseline determinations include an "economic interest peculiar to the region

¹³³ Several examples illustrate the strength of the OCS and the Commonwealth's refusal to prevail over state legislation with respect to the marine environment [other than the Great Barrier Reef]. Firstly, in 1980 the Commonwealth acted to ban whaling by enacting the *Whale Protection Act 1980* (Cth) but did not apply this legislation to the narrow strip of state coastal waters. Similarly, the *Environment Protection (Sea Dumping) Act 1981* (Cth) enacted in sympathy with the attention being given to the offshore applied to state coastal waters only if the Commonwealth is satisfied that the states themselves have not legislated to cover this field. The Commonwealth also refused to intrude upon state coastal management even though the opportunity arose to link developments in this area with marine policy initiatives being progressed under the OCS. See: R. Hildreth, *op cit* fn 125.

¹³⁴ The principle of straight baselines departs from the custom where low water mark equates with the territorial sea baseline. This principle allows straight baselines to be drawn across heavily indented coastlines, thereby enclosing gulfs, bays and island chains within the boundaries of coastal States.

¹³⁵ Prescott, *op cit* fn 49.

concerned, the reality and importance of which are clearly evidenced by a long usage".¹³⁶

Relying upon these provisions emerging under the LOSC umbrella, boundaries were finally closed around Australia in early 1983 thereby bringing the OCS into effect [discussed further in Chapter Five]. Prescott observes that while state governments had not unduly delayed the finalisation of baselines, progress had been rather slower than was anticipated by the Commonwealth.¹³⁷ Although generally of little economic relevance, the importance of baseline coordinates was amplified in the case of the highly prospective north west shelf of Western Australia. In this region, tidal flows range to a depth of nine metres with a linear distance of several miles. Parliamentarians and commentators alike recognised that claims over offshore deposits were thus dependent upon the precise location of baselines.¹³⁸ In the event, the baselines adopted by the Commonwealth were drawn very modestly compared with those permissible under international law.¹³⁹ The resolution reached in terms of baseline drawing is perfectly captured by Burmester –

In a federal State like Australia there are always tensions between State Governments, which have an interest for their own jurisdictional purposes in an expansive view of baseline entitlements, and the national Government, which has an interest in not making excessive claims from an international law point of view. The 1983 baselines

¹³⁶ Convention on the Territorial Sea and Contiguous Zone, Arts 4(3) and (4), respectively. See, D. Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, Oxford, London, 1987).

¹³⁷ Prescott, op cit fn 24.

¹³⁸ Delays in the drawing of straight baselines postponed the declaration of marine parks on the east and west coasts of Australia. The Commonwealth and Queensland disputed the western boundary of the first section of the Great Barrier Reef Marine Park, thereby strengthening the Commonwealth's resolve to retain control over the reef. On the west coast, proposals to declare Ningaloo Marine Park were held in abeyance several years until baselines were drawn and the inner boundaries of state and Commonwealth waters settled. *Hansard*, Senate, 21 May 1980, p 2604; Prescott, op cit fn 49; Report of the Ningaloo Marine Park Working Group, National Parks Authority, 1983; Reid, op cit fn 62.

¹³⁹ Opekskin and Rothwell, op cit fn 4 p 409.

represent a compromise in this regard between the desires of the State and Commonwealth Governments.¹⁴⁰

4.3 THE OFFSHORE PETROLEUM REGIME UNDER THE OCS

4.3.1 Outline of the scheme

The approach to petroleum development under the OCS retained a strong sense of Commonwealth/state cooperation in offshore exploration and production. However, substantial modifications were needed to give effect to the OCS. The *Petroleum (Submerged Lands) Act* 1967 (Cth) was amended to agree with the coastal waters legislation; that is, to apply seaward of the territorial sea out to the edge of the continental shelf as defined in the 1958 Convention, which remained appended to the P(SL)A. State legislation was repealed and replaced with new statutes of the same name which applied between the coastline and the limit of coastal waters. The amended *Petroleum (Submerged Lands) Acts* therefore created a mirror legislative regime because the identical state and Commonwealth statutes were now complementary rather than overlapping, thereby creating a consistent regulatory regime across the waters of both jurisdictions. Section 150 of the Commonwealth P(SL)A, included in 1967 to allow the two statutes to operate in parallel, was repealed to ensure that each statute operated to the exclusion of the other within their respective areas of application.¹⁴¹

The evolution of the offshore petroleum regime ensured that the states retained a significant decision-making role under the OCS, even though the waters under their jurisdiction were insignificant compared with the situation that existed before 1973. Indeed, the resolution of the offshore petroleum regime may well have driven the whole OCS.¹⁴² At the same time,

¹⁴⁰ Burmester, op cit fn 42 p .

¹⁴¹ Cullen, op cit fn 2.

¹⁴² Herr and Davis, op cit fn 13.

the admission of the states to a offshore role recognised that exclusive Commonwealth control of the continental shelf was unrealistic. The legitimacy of state governments in offshore petroleum policy is reflected in the substantial roles they were given under the updated regime.

State ministers were vested with three separate positions under the OCS petroleum arrangements, the most easily understood being that filled within state waters. Relevant state ministers were empowered under the *Petroleum (Submerged Lands) Acts* of the states to regulate petroleum development in their respective coastal waters, which are defined in terms consistent with the definition adopted in the *Coastal Waters (State Powers) Act*.¹⁴³ Broadly, these powers relate to the grant, renewal and variation of statutory instruments to explore for and produce petroleum in coastal waters. The state's jurisdiction to develop offshore resources within three miles of the coast is essentially exclusive, subject to the paramountcy of Commonwealth law as enshrined in the *State Powers Act*.

Further offshore in Commonwealth waters the P(SL)A regime is more intriguing and complicated than the state regime located in coastal waters. Reviewing the Commonwealth's component of the offshore petroleum regime suggests of the continuing strength of the states' in offshore petroleum development. The amended Commonwealth *Petroleum (Submerged Lands) Act* establishes two functionaries in relation to each of the seven adjacent areas—that is, the continental shelf adjacent to each Australian state—charged with policy making and administration of the regime. These functionaries are termed respectively the joint and designated authorities.

¹⁴³ In the case of Western Australia, the statute was the *Petroleum (Submerged Lands) Act* 1982 (WA).

The peak decision-making body is the joint authority, a two-person authority comprising the Commonwealth and relevant state minister.¹⁴⁴ The joint authority is vested with vital functions relating to the initial award and renewal of petroleum instruments, equivalent to those available to the state minister under the mirror *Petroleum (Submerged Lands) Acts* in coastal waters.¹⁴⁵ In the event of disagreement between the joint authority members regarding development approvals, the Commonwealth's decision prevails, a provision that reflects the dominant—and indeed, exclusive—role that the Commonwealth could insist upon as a matter of law.¹⁴⁶ Through the joint authority the states therefore contribute directly to petroleum decision making in a manner which ignores the strict constitutional circumstances of offshore jurisdiction.

The third role filled by state ministers is that of designated authority, continued under the Commonwealth Act but modified from its antecedent form begun in 1967. In the previous regime, the designated authority was the only decision maker offshore, exercising both state and Commonwealth powers in respect of each adjacent area. The designated authority was continued by the OCS-amended *Petroleum (Submerged Lands) Act 1967 (Cth)* although with reduced powers and functions, the bulk of these having been transferred to the joint authority.¹⁴⁷ The role of the designated authority was revised to be concerned with more routine aspects supportive of petroleum recovery from the continental shelf, rather than with policy decisions pertaining to the award of instruments. To this end, the Commonwealth P(SL)A assigned to the designated authority a range of powers including those relating to the advertisement of blocks; renewal of exploration permits;

¹⁴⁴ *Petroleum (Submerged Lands) Act 1967 (Cth)* s 8.

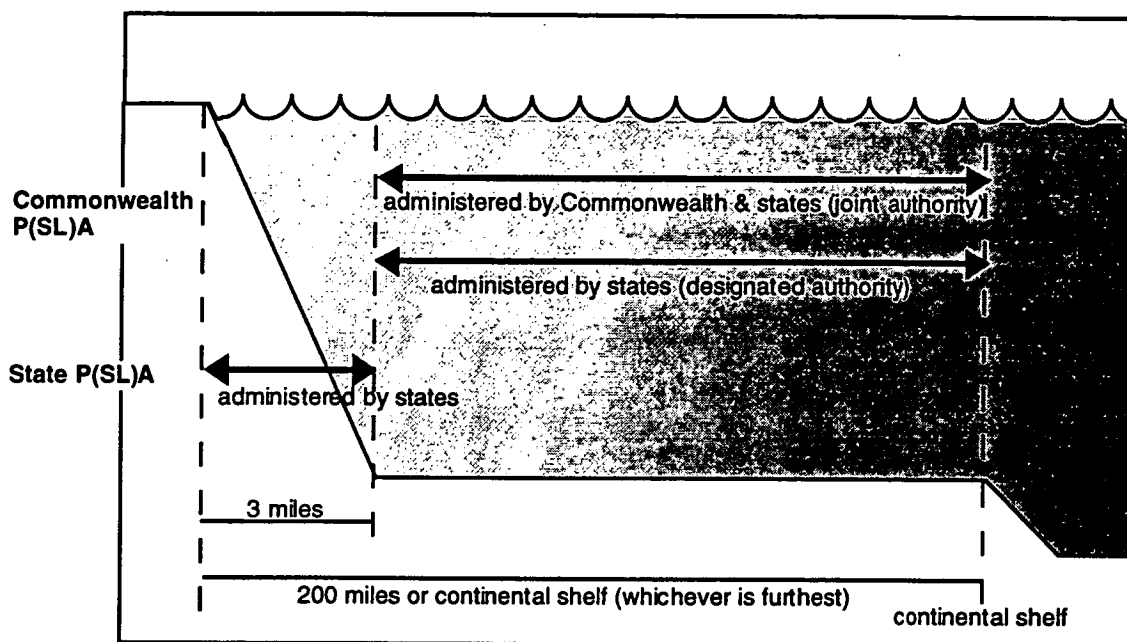
¹⁴⁵ J. Forbes and A. Lang, *Australian Mining and Petroleum Laws* (Butterworths, Sydney, 1987).

¹⁴⁶ *Petroleum (Submerged Lands) Act 1967 (Cth)* s 8(D)(3). See: Rothwell and Haward, *op cit* fn 87.

¹⁴⁷ *Petroleum (Submerged Lands) Act 1967 (Cth)* s 14.

application for production licences; and carrying out of works.¹⁴⁸ Figure Three depicts the sharing of Commonwealth and state powers in the OCS-amended petroleum regime.

Figure 4. Commonwealth-state offshore petroleum arrangements 1982



4.3.2 State participation in the P(SL)A

The intention and purpose of the P(SL)A amendments were amply conveyed by the prime minister during the second reading speech for the OCS statutes –

Perhaps the most important of these is the Petroleum (Submerged Lands) Amendment Bill which is designed to give effect to revised arrangements for the administration of off-shore petroleum mining outside the territorial sea. Day-to-day administration will continue to be in the hands of the designated authority appointed for the adjacent area of each State—that is, the State Minister. But, as a new step, a statutory joint authority is to be established for each adjacent area consisting of the Commonwealth Minister and the State Minister, to deal with major matters arising under the legislation. In the event of disagreement, the views of the Commonwealth are to prevail. Off-shore petroleum mining inside the outer limits of the territorial sea is to be the responsibility of the States alone ... The new arrangements will ensure

¹⁴⁸ *Petroleum (Submerged Lands) Act 1967* (Cth) ss 20(2), 31(5), 39A(5)(b) & 40(4)(b), s57(4), respectively.

that national interest in off-shore petroleum activities can be asserted while retaining the valuable role that the States currently play.¹⁴⁹

The Coalition Government was patently committed to enacting legislation which would preserve the capacities of the states in administering the Commonwealth's offshore petroleum regime, but wherein the latter could ultimately prevail. Put in terms of the High Court's decision in the *Seas and Submerged Lands* case, the involvement of the state governments in the Commonwealth's P(SL)A regime is remarkable. Notwithstanding the inter-governmental support for the new arrangements, the Labor Opposition rejected the sectoral arrangements for offshore petroleum, as it had done with the OCS generally.

Labor's hostility towards the OCS stemmed in part from the rejection contained therein of the offshore policy first articulated by Whitlam and implemented through the SSLA. The Labor Party strongly propounded the view that the P(SL)A should be administered by the Commonwealth to the exclusion of the states. Bill Hayden, the leader of the Opposition, noted that it would be extremely difficult to develop a national energy policy for Australia under the P(SL)A, a Labor directive dating from Whitlam's efforts in the early 1970s. To this end, then shadow spokesperson on resources and later prime minister, Paul Keating berated in Parliament –

We are not at issue with the questions of the States having control over ports, estuaries, harbours, and some fishing rights. That is not at issue. The thing at issue is simply this: who runs oil in Australia offshore, the Commonwealth or the State Ministers for Mines?¹⁵⁰

4.3.2.1 *Joint and designated authority powers*

The most important apparent role of the states in offshore petroleum policy was to be realized acting as a member of the joint authority.¹⁵¹ The Minister

¹⁴⁹ *Hansard*, House of Representatives, 23 April 1980, p 2168.

¹⁵⁰ *Hansard*, House of Representatives, 1 May 1980, p 2537.

¹⁵¹ Saunders and Wiltshire, *op cit* fn 11.

for Trade and Resources, Doug Anthony, summarised the role of the joint authority during the second reading speech –

... the joint authorities would be responsible for: major matters relating to titles (granting or refusal, renewal, transfer, farm-ins et cetera), determining conditions of titles including work and expenditure, directions of a permanent or standing nature ... Schedule 1 lists those sections of the principal Act which require a decision by the joint authority. In schedule 5, clause 59 of the Bill are listed those sections of the principal Act which the Commonwealth Minister, at his discretion, may refer to the joint authority for a decision. As I mentioned earlier, these are the important decisions which have a significant bearing on the overall implementation of the legislation.¹⁵²

Notwithstanding the enthusiasm given by the Commonwealth to the joint authority model, Haward remarks that the states were reluctant to enter into a joint authority arrangement whereinunder they would be compelled to yield to the Commonwealth.¹⁵³ In consequence, the influence of the designated authority became elevated over its original intended role through the discretion given to this functional position, as enhanced by imprecision in drafting the designated authority's powers and functions.

A point of particular concern was the power of the designated authority to order the rate of petroleum production to be varied. Powers with respect to variation in recovery rates are found in s 58 of the P(SL)A, "Directions as to recovery of petroleum". Analyses of designated authority powers concentrate on the extent of the state ministers' capability to direct title holders to alter their work practices under this section. The joint authority was clearly the body empowered to order the recovery of recoverable petroleum not being produced by a licence holder.¹⁵⁴ However, the situation with respect to altering the *rate* at which petroleum is being recovered was confused by the

¹⁵² *Hansard*, House of Representatives, 1 May 1980, p 2173.

¹⁵³ Haward, *op cit* fn 1.

¹⁵⁴ *Petroleum (Submerged Lands) Act 1967* (Cth) s 58(1).

fact of this latter power residing with the designated rather than the joint authority.¹⁵⁵

Argyle argues that because the designated authority was vested with administrative or routine responsibilities, any decision by the state minister to alter production was limited to the circumstances of that individual licence.¹⁵⁶ At the same time, the construction of the P(SL)A meant that the Commonwealth was unable to influence the designated authority's deliberations to alter production rates, creating uncertainty as to the role of the two authorities in setting and administering offshore petroleum policy. Schedule 5 to the P(SL)A listed a range of functions that were referable to the joint authority at the discretion of the Commonwealth minister, to provide the latter with the opportunity to review decisions made by the states. However, varying the rate of production was not one of these identified functions. Reid identified similar difficulties in relation to regulating, making permanent directions, and other Commonwealth responsibilities, including determining royalties.¹⁵⁷ As Chapter Five shows, the Commonwealth soon thereafter amended the P(SL)A to clarify some of these ambiguities, to ensure that it could prevail in continental shelf policy.

4.3.2.2 *The Schedule 4 agreement with Western Australia*

OCS-amendments to the *Petroleum (Submerged Lands) Act* singled out Western Australia for preferential treatment compared with other states. The form of this treatment was an Agreement entered into between Western Australia and the Commonwealth, applicable only to Commonwealth waters adjacent to that state.¹⁵⁸ The Agreement was principally an elaborate

¹⁵⁵ *Petroleum (Submerged Lands) Act* 1967 (Cth) s 58(3).

¹⁵⁶ Argyle, op cit fn 117.

¹⁵⁷ Reid, op cit fn 62.

¹⁵⁸ *Petroleum (Submerged Lands) Act* 1967 (Cth) Schedule 4 Agreement between the Government of the Commonwealth and the Government of Western Australia relating to legislation in respect of offshore petroleum resources.

mechanism to prevent the Commonwealth from prevailing in joint authority decisions in respect of waters adjacent to Western Australia, except if the decision endangered or was prejudicial to the national interest [a concept discussed briefly further below].¹⁵⁹

In the exceptional situation of national interest, the Agreement required that an attempt had first to be made between the premier and prime minister to resolve differences, elevating the decision from the level of minister as ordinarily applied in the case of joint authority decision making.¹⁶⁰ Upon fulfilment of protracted procedural requirements, the prime minister could finally prevail if a resolution between the Commonwealth and state leaders could not be reached. In other words, the Commonwealth could only prevail in relation to Western Australian continental shelf decisions if the matter jeopardized the national interest, and even then a lengthy prime ministerial decision had to be made. The Agreement was codified as a Schedule to the Commonwealth P(SL)A and thereby given the force of law, unlike the Agreement under the 1967 Settlement.¹⁶¹ Argyle expresses the legal situation offshore Western Australia thus –

Absent prejudice to the national interest, the views of the Western Australian State Minister may ultimately prevail in decisions of the joint authority.¹⁶²

Part of the negotiating position Western Australia assumed vis-a-vis the Commonwealth in the late 1970s was attributable to the personal strength of the state Liberal Coalition premier, Charles Court.¹⁶³ Court's influence was identified as shaping the new P(SL)A regime as significantly as Henry Bolte had done ten years earlier in the case of Bass Strait off Victoria.¹⁶⁴ A second

¹⁵⁹ Saunders and Wiltshire, *op cit* fn 11.

¹⁶⁰ *Petroleum (Submerged Lands) Act 1967* (Cth) Schedule 4 c 2.

¹⁶¹ *Petroleum (Submerged Lands) Act 1967* (Cth) s 8D(9), Schedule 4.

¹⁶² Argyle, *op cit* fn p 17.

¹⁶³ See, *Hansard*, House of Representatives, 23 April 1980, pp 2525, 2551, 2553; Senate 21 May 1980, p 2605.

¹⁶⁴ *Hansard*, House of Representatives, 1 May 1980, p 2531.

factor underpinning the Schedule 4 Agreement was geographical in nature. In Parliament, the "remoteness and other special circumstances" of Western Australia were held to justify the Commonwealth entering into arrangements peculiar to this state.¹⁶⁵ As stated earlier, the emerging viability of the north west shelf oilfields and their very great distance from Canberra ensured that Western Australia was able to insist upon favourable terms during OCS negotiations.¹⁶⁶ Stevenson noted the undeniable importance of state governments in resources policy at the time –

... the state level of government has acquired vitally important economic functions and responsibilities. State departments of mines have become the primary focus of dealings with the public sector for some of the most important firms in the Australian economy. State capitals, especially Brisbane and Perth, have become places where important decisions are made to a far greater extent than they were in the early 1960s ... Their control over mining leases and exploration permits give them influence and power that cannot be ignored by the private sector, by the federal government, or by Australia's trading partners overseas.¹⁶⁷

Predictably, the Schedule 4 Agreement was lamented by the Labor Opposition as "one of the worst sell-outs" of the OCS because it denied the Commonwealth from exercising a veto over Western Australia.¹⁶⁸ As with

¹⁶⁵ *Hansard*, House of Representatives, 23 April 1980, p 2173.

¹⁶⁶ Lingering doubts concerning state legislative power over coastal waters prompted most states to pass legislation to extend explicitly their law-making capability to the three-mile territorial sea. Western Australia was one of the states to so legislate by enacting the *Offshore (Application of Laws) Act* in 1982. Two remarks perhaps explain why the states—and Western Australia in particular—should take this precautionary legislative action. One reason relates to latent concerns harboured by states over the reliability of offshore jurisdictional arrangements. Not reassured by the preceding years of jurisdictional uncertainty, states acted decisively to put beyond doubt as best they could their assertion of general extra-territorial legislative competence. Secondly, frontier hydrocarbon areas opening up on the north west coastal area of Western Australia motivated the state to put beyond doubt its capacity to exercise jurisdiction over coastal waters. The *Offshore (Application of Laws) Act* 1982 (WA) was the state's attempt to secure a valid claim to the lucrative deposits that were lying offshore in its coastal waters. It is likely also that Western Australia was using this approach as a lever to extend its reach to Commonwealth waters. That is, an assertive claim over state coastal waters assured the state of participating in the development of petroleum deposits located further offshore on the continental shelf.

¹⁶⁷ G. Stevenson, *Mineral Resources and Australian Federalism* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1976), p 86.

¹⁶⁸ *Hansard*, House of Representatives, 1 May 1980, p 2551.

the role of the designated authority, the Agreement was swiftly dismantled by the Labor Government upon its return to office [Chapter Five].

4.3.2.3 *Commonwealth relations with industry*

It is informative to observe the waning influence of the oil industry on the form of the P(SL)A. During OCS negotiations, three matters of especial concern were raised by the offshore petroleum industry: the non-reviewability of designated authority decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) [a concern first raised by the 1971 Senate Select Committee]; the question of whether offshore petroleum titles constituted a proprietary interest that were recompensable in the event of their resumption; and the inclusion of s 103A which enabled the suspension or cancellation of titles in pursuit of the national interest.¹⁶⁹

Most of the above concerns were ignored by the Commonwealth in its amendments to the P(SL)A. Indeed, the Commonwealth was urged in Parliament to legislate assertively to secure offshore resources from exploitative development by industry conglomerates.¹⁷⁰ Those concessions which the oil industry was able to achieve in 1980 are attributable more to the Department for National Development arguing for their inclusion in the amending legislation than to the efforts of APEA or AMIC, let alone individual companies. Reid describes the waning influence of the oil industry in these terms –

At the industry level, the Australian Petroleum Exploration Association lodged a submission on 30 November 1977 with the Commonwealth Department for Natural Resources in which it proposed certain amendments to the existing Petroleum Submerged Lands Act based on nine years' experience of operations under that legislation. Subsequent attempts by industry representatives to ascertain further details on the progress of the negotiations were resisted by both Commonwealth and

¹⁶⁹ Reid, op cit fn 62; Argyle, op cit fn 117.

¹⁷⁰ *Hansard*, Senate, 21 May 1980, p 2605.

State officials with the explanation that "the issue was too sensitive politically."¹⁷¹

This situation contrasts to that existing just ten years earlier when offshore operators were seen to have largely prevailed in their interactions with both spheres of government. During the next evolutionary phase of the offshore petroleum regime, the oil industry is seen to have become further marginalised in terms of its ability to influence Commonwealth resources policy. Whilst the relationship between industry and government is partly found in the persuasion and philosophy of the party in power, the Commonwealth has clearly become more assertive in dealing with the influential oil industry, and very much determines the pace and direction of offshore activity, as well as maintaining the regulatory framework.

4.4 CONCLUSION TO CHAPTER FOUR

The Offshore Constitutional Settlement was a mixture of shared Commonwealth and state responsibilities, constructed mindful of emerging international influences but reassigning jurisdiction within the national context.¹⁷² Within this framework, the offshore petroleum regime was crafted to ensure that offshore development could proceed with certainty and be assured of continuity beyond the life of the Fraser Government. Through the joint authority device states were able to participate directly in the award of Commonwealth titles to explore for and produce petroleum from the continental shelf, the key policy decisions available under the *Petroleum (Submerged Lands) Act 1967* (Cth). These decisions were ultimately a Commonwealth prerogative if state and federal governments disagreed over a particular application, or more likely, over the policy goal towards which an individual licence decision was intended. In this regard, the arrangements

¹⁷¹ Reid, op cit fn 62 p 64.

¹⁷² Crommelin, op cit fn 2.

imposed an additional burden upon the Commonwealth in waters adjacent to Western Australia.

Through the position of designated authority the states also made decisions concerning the administration of mining titles in respect of the continental shelf on the Commonwealth's behalf. The totality of the petroleum regime was therefore an arrangement whereby the state governments exercised effective sovereignty within coastal waters while assisting the Commonwealth to set policy for and administer the resources of the expansive continental shelf.

Prime Minister Fraser captured the intention of the P(SL)A regime during debate on the Offshore Constitutional Settlement, as well as alluding to some of the influences thereupon –

The present Bill—the Coastal Waters (State Powers) Bill—is the cornerstone of the package ... The remaining Bills in the package—the Petroleum (Submerged Lands) Bill, the Navigation Amendment Bill and the Historic Shipwrecks Bill—give effect to the agreed arrangements to apply in relation to particular areas of off-shore activity both within and without the territorial sea. Here again, from a position where the Commonwealth has full constitutional authority, the Commonwealth has chosen to recognise the concerns of the States, to find a solution which will utilise the skills and expertise of existing administrations and will allow a sharing of resources that should benefit the nation as a whole. In this way, the Commonwealth is acting in the true spirit of federalism.¹⁷³

Notwithstanding Fraser's effusive comments, the P(SL)A regime is best considered as a fascinating, even experimental, inter-governmental model for offshore resources policy. On the one hand, the states were rewarded with the return of coastal waters as part of the OCS, and in this sense politics triumphed over legal realities. As well, state ministers were vested with considerable decision-making powers in respect of the extended continental shelf, a striking situation when put in the perspective of the High Court decision in

¹⁷³ *Hansard*, House of Representatives, 23 April 1980, p 2165.

New South Wales v the Commonwealth.¹⁷⁴ The cooperative arrangements of 1967 fundamentally shaped the policy approach taken in 1980, as did formative international legal principles, the personal influences of the Queensland and Western Australian premiers, and the New Federalism policy of the Commonwealth.

On the other hand, it has been suggested that the states were satisfied with a protracted and complicated settlement that gave them little in political and economic gain compared with the earlier 1967 arrangements.¹⁷⁵ This narrow view holds that the return to states of their coastal waters under the OCS placated modest offshore demands in a highly visible commitment to new federalism. Such opinions, however, ignore the very considerable powers and functions given to state ministers as both joint and designated authority, however.

On balance, it is fair to say that the Commonwealth realized the necessity of admitting the states to an offshore role but was reluctant to divest itself of its expanded decision-making competence and capability to veto non-negotiable items. The Commonwealth defined the terms and conditions by which states would be readmitted to an offshore role, and was cautious not to return an excess of authority and territory to the states pursuant to the OCS. Stevenson is one observer to understand the gradual but unmistakable centralizing of legislative policy that continued under Fraser, within the context of renewed federalism –

While the last two chapters [of his monograph] have not provided a complete account of the federal government's mineral resource policies in the early 1970s, they have contained enough information to suggest the general trend of policy. The most consistent tendency was for the federal government to intervene increasingly in the management of mineral resources, rather than leaving it to the private sector or the states. In the judgement of many observers, this tendency first became

¹⁷⁴ Crommelin, *op cit* fn 132; Herr and Davis, *op cit* fn 13.

¹⁷⁵ Cullen, *op cit* fn 18 pp 219-222.

noticeable when Mr Gorton was Prime Minister. It continued under Mr McMahon, accelerated sharply under Mr Whitlam, and seems to be abating only slightly under Mr Fraser.¹⁷⁶

Given the tortuous history of offshore resources policy, including the Labor Party's opposition to the OCS and the Commonwealth's greater offshore presence, it is unsurprising that the offshore industry in particular held little hope that the amended petroleum regime would be any more successful than its antecedent versions. At the time that the OCS was enacted, an APEA spokesperson expressed doubt that the new regime would endure beyond the next federal election –

...the extent of the political achievement should be tempered with the political reality that this does not represent a bipartisan solution and that it is open to political and constitutional challenge by a future Labor government or an aggrieved party. The legal means for enacting this political settlement, while representing ingenious and at times innovative legal drafting, at the same time contain the seeds for possible legal challenge. To this extent the new package introduces wider elements of political and legal uncertainty in areas which had been left 'on the shelf' under the 1967 Petroleum (Submerged Lands) Act.¹⁷⁷

The thesis now turns to examine how the P(SL)A regime endured following the change in federal government soon after the OCS was brought into operation. Despite having campaigned so intensely against the legislation, upon election to office the Labor Government reneged on its pledge to dismantle the new offshore arrangements, instead amending the P(SL)A to further redistribute joint and designated authority responsibilities—and therefore the roles of the states and Commonwealth—in offshore petroleum policy while leaving the OCS framework intact. Chapter Six following reveals how the coastal waters legislation to this day still provides the parameters for

¹⁷⁶ Stevenson, *op cit* fn 167 p 63.

¹⁷⁷ Orchison, *op cit* fn 116 p 20.

accommodating Commonwealth/state interaction in this volatile area of marine policy.¹⁷⁸

¹⁷⁸ Fraser remarked during debates that the OCS would provide for a "mutually acceptable accommodation of interests". *Hansard*, House of Representatives, 23 April 1980, p 2166. This same expression was used previously to characterize the original 1967 Settlement.

Chapter Five

Commonwealth Policy Maturity and Offshore Petroleum – 1983-1995

The fourth and longest evolutionary phase of the *Petroleum (Submerged Lands) Act* was overseen by the Hawke Labor Government. Despite initially advocating a return to an interventionist style of government—Labor's more traditional approach to public policy—Hawke came to appreciate the federal system of power and learned to work within its constraints. This revised approach to policy making has been referred to as Labor's reconciliation with federalism.¹

In terms of offshore petroleum, Labor had expressed its intention to assert full and exclusive jurisdiction over the offshore when it was returned to office, having made clear during parliamentary debates its opposition to the Offshore Constitutional Settlement. Labor's attitude towards offshore jurisdiction was partly vindicated by the actions of the Victorian state minister, who as designated authority attempted to control the production of Bass Strait oil in the early 1980s by exploiting the ill-defined designated authority powers.² Rather than legislating to repeal or overturn the OCS, however, the Commonwealth instead amended the P(SL)A on a number of occasions to ensure that the Commonwealth was able to assume a much expanded role in offshore petroleum policy. That the P(SL)A was reformed in this manner without reopening thorny jurisdictional issues bears testament to the Commonwealth's maturity as an offshore policy maker.³

¹ B. Galligan and D. Mardiste, "Labor's Reconciliation with Federalism" (1992) 27 *Australian Journal of Political Science* 71-86.

² R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" (1988) 6 *Journal of Energy and Natural Resources Law* 213-247.

³ C. Hunt, "The Offshore Petroleum Regimes of Canada and Australia: Some Comparative Observations" (1990) 9 *Australian Mining and Petroleum Law Association Bulletin* 103-111;

Despite the improved capability of the Commonwealth to legislate in respect of the continental shelf, there are still notable deficiencies in its legislative strategy towards offshore petroleum. Most obviously, in 1994 the Commonwealth legislated to implement only the resource-related provisions of the Law of the Sea Convention while neglecting other areas of marine policy.⁴ Coastal management has also been neglected by the Commonwealth as a policy area, while offshore oil development escaped external environmental review until this situation was remedied by a Federal Court decision against the Commonwealth in 1995. Between the years 1983 and 1995, therefore, the P(SL)A regime is best characterised as one of Commonwealth legislative activity designed to ensure that the national interests in offshore petroleum could be progressed with few constraints of an inter-governmental, industrial or environmental nature.

The first part of this chapter introduces the Hawke Government's approach to policy making and the Offshore Constitutional Settlement. Part two focuses upon reform of the *Petroleum (Submerged Lands) Act*, showing how the Commonwealth has come to assert its jurisdictional superiority while continuing to retain the states as partners in the continental shelf regime. The third part of the chapter discusses related coastal and ocean initiatives within this context of Commonwealth policy-making maturity.

M. White, *Marine Pollution Laws of the Australasian Region* (The Federation Press, Sydney, 1994).

⁴ D. Rothwell, "Australia and the United Nations Convention on the Law of the Sea" (1994) 24 *International Law News* 30-35; N. Evans, "LOSC, Offshore Resources and Australian Marine Policy" (1996) 20 *Marine Policy* 223-227. Many of these other areas of marine policy, such as scientific research and environmental protection, are being addressed through the oceans policy being developed over 1997-1998 [Chapter Six].

5.1 THE COMMONWEALTH AND STATE/INDUSTRY RELATIONS

5.1.1 The Hawke Government's approach to policy making

A Labor Government was elected to office in March 1983, due in no small way to the popularity of its newly appointed party leader, Bob Hawke. Indeed, the error in judgement on Fraser's part in calling the federal election when he did has entered into Australian political history.⁵ Unlike the style and approach to government of Whitlam and previous Labor leaders, Prime Minister Hawke showed a remarkable pragmatism in working with the states.⁶ Galligan and Martiste argue that it was under Hawke's leadership Labor finally became reconciled with the structure of Australian federalism.⁷ In this respect, it is important to note that Hawke was assisted in his endeavours by having four of the six states under "highly competent and stable" Labor governments.⁸ Other commentators, however, promote the view that Prime Ministers Hawke and then Keating betrayed the centralist ideals of Labor.⁹

As Hawke reconciled with Australia's federalist structure, so too did this reconciliation extend to and include organized business communities and employee groups. The basis of the Accord, as this method of engagement was termed, is described by Davis.¹⁰ The Accord was heavily predicated upon consensual dialogue and negotiation amongst government, business and trade unions with respect to wages policy. By involving all parties in a policy development process participants were bound thereby to its outcomes. The

⁵ "Power over timing is everything" *The Canberra Times*, 15 August 1998.

⁶ B. Galligan, "A Political Science Perspective", in B. Galligan (ed), *Australian Federalism* (Longman Cheshire, Melbourne, 1989) pp 45-68.

⁷ Galligan and Martiste, op cit fn 1.

⁸ Galligan, op cit fn 6.

⁹ D. Jaensch, *The Hawke-Keating Hijack* (Allen & Unwin, Sydney, 1989).

¹⁰ K. Davis, "Managing the Economy", in B. Head and A. Patience (ed), *From Fraser to Hawke* (Longman Cheshire, Melbourne, 1989) pp

Accord methodology eventually emerged as a model which could be applied to other antagonistic policy areas, such as the environment and offshore oil and gas development.¹¹

As Fraser had done previously, the Commonwealth entered into arrangements with state governments to clarify the role of both governmental spheres in international matters. Guidelines on Treaty Consultation, prepared early during the Hawke Government's term, specified the extent to which the Commonwealth would defer to states on treaty implementation –

The Commonwealth will consider relying on state legislation where the treaty affects an area of particular concern to the states and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However the government does not accept that it is appropriate for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.¹²

The Guidelines make apparent that the Commonwealth was prepared to allow the states some latitude in international treaty implementation where this was appropriate, while reserving to itself the right to intervene as befitting its role as national government. This approach was consistent with the broad framework of Hawke's reconciliation with federalism. The operationalization of this approach in various marine policy sectors is explored further in the following and later sections.

5.1.2 Hawke and the Offshore Constitutional Settlement

Despite the OCS having been finally reached in 1980, several more years lapsed before the legislation giving effect to the agreed arrangements was

¹¹ It is important to note that the Commonwealth under Hawke was not always so equable in its interaction with the states, but evolved to this new steady state of federalism. The transformation of the Commonwealth's intergovernmental interaction is best revealed in the context of environmental policy, described in Part 5.3 following.

¹² H. Burmester, "A Legal Perspective", in B. Galligan (ed), *Australian Federalism* (Longman Cheshire, Melbourne, 1989) pp 192-216, p 205.

brought into force. The lack of petroleum prospectivity around much of the coastline meant that the states were ambivalent about legislating to establish the petroleum regimes applicable to their waters. Consequently, the state legislation applying to coastal waters was not enacted for a further two years following the Commonwealth's amendments to its P(SL)A. It was after the offshore petroleum legislation was aligned that the *State Powers Act* was proclaimed without incident in January 1982.

Proclamation of the *State Titles Act* was abeyed another full year, due to technical difficulties in drawing closing baselines around the coastline to delineate the areas accruing to the Commonwealth and states [discussed previously in relation to the Great Barrier Reef]. After much delay new baselines were drawn and gazetted under the *Seas and Submerged Lands Act* on 9th February 1983, drawn conservatively to reflect the provisions of the recently signed Law of the Sea Convention.¹³ Five days later the *State Title Act* entered into force by virtue of these baselines, effectively putting the OCS beyond immediate alteration.¹⁴ The particular notoriety of this proclamation is that it occurred on the day that Parliament was prorogued for forthcoming federal elections, defying parliamentary customs about the role of caretaker governments.¹⁵ Given the considerable controversy already surrounding the means employed to enact the coastal waters legislation, the circumstances within which the *State Titles Act* was proclaimed added to the heightened political interest in the offshore.

The Labor Opposition was incensed by the tactic employed to bring the Offshore Constitutional Settlement into force. In remarkably similar

¹³ The scale of the delay in bringing the OCS into force is revealed by the fact that in mid-1981, it was anticipated that baselines would be proclaimed by the end of that year. See, Department of National Development and Energy *Annual Report 1980-81* (Australian Government Publishing Service, Canberra, 1981).

¹⁴ Commonwealth of Australia Gazette No GN 25, 28 June 1983.

¹⁵ M. Haward, *Federalism and the Australian Offshore Constitutional Settlement* (University of Tasmania, PhD thesis, 1992) pp 207-210.

circumstances to those surrounding the decision in *New South Wales v the Commonwealth*, less than a month after the OCS legislation was formally proclaimed the Fraser Government was voted from office. Haward was one author to appreciate the irony of the situation facing the incoming Hawke Government, as had confronted Fraser with respect to Whitlam's offshore legacy, the SSLA.¹⁶ The return of Labor to government potentially presented substantial problems for the preservation of the OCS, given the Opposition's condemnation of the legislation during its passage through Parliament in 1980. There was some uncertainty as to whether Labor would legislate to alter the OCS in entirety, or amend just the minerals components.¹⁷

Upon ascending to office, the Hawke Labor Government reviewed the OCS to ascertain the desirability or otherwise of retaining the legislative arrangements entered into by Fraser. The stated principle of Labor to undo the OCS was endorsed at the biennial ALP conference in 1984, and reiterated in the ALP Platform, Constitution and Rules two years later.¹⁸ Whilst remaining staunchly opposed to the OCS as a matter of philosophy, however, the Hawke Government satisfied itself that the policy and administrative arrangements thereunder were nonetheless working to the Commonwealth's benefit. Replying to a question on the subject in Parliament, Barry Jones, the minister representing the Minister for Resources and Energy, explained –

The Government is of the view that title over the territorial sea should not have been transferred from the Commonwealth by the previous Government. However, the arrangements which were entered into as part of the Offshore Constitutional Settlement have been working satisfactorily and for this reason the Government does not intend to take action at the present time to regain title to the territorial sea. Nor does the Government intend to alter the current powers legislation. This approach will remain dependent on the continuing satisfactory operation of the existing arrangements which will be kept under review.

¹⁶ Ibid.

¹⁷ M. Haward, "The Australian Offshore Constitutional Settlement" (1989) 13 *Marine Policy* 334-348.

¹⁸ R. Herr and B. Davis, "The Impact of UNCLOS III on Australian Federalism" (1986) 41 *International Journal* 674-693.

The question of resuming title may be reconsidered by the Commonwealth should any of the States or the Northern Territory not be prepared to continue acting in ways compatible with the national interest while exercising powers under the OCS.¹⁹

That the Hawke Government should so completely reverse its position towards the offshore, as Fraser did in 1976 regarding the return of offshore jurisdiction to the states, is due to a combination of reasons. The constitutional problems were canvassed in detail in Chapter Four. Any attempt to alter the OCS would at the very least trigger another wave of judicial review. The Commonwealth in 1983 could not attempt to repeal the *Coastal Waters Acts* with any confidence as to the outcome, given the lack of a coherent opinion on the subject and the ambiguous precedent set by High Court interpretations. Moreover, had such repeal or amendment been possible, the Commonwealth would almost certainly have been confronted with liability for just terms compensation. With such uncertainties, the federal government was discouraged from challenging the OCS legislation directly.

Very real political and policy reasons also help to explain the Hawke Government's decision not to confront the prospect of undoing the OCS. The political costs would have been enormous, especially coming so soon after the internecine inter-governmental disputes over the environment [discussed further in part three]. Perhaps most fundamentally, the decision not to challenge the OCS represents a realization on the part of the Commonwealth that the assistance of state governments was essential for administering the offshore petroleum regime. Legislating to assert an exclusive Commonwealth role over the continental shelf rejected the basic premise of inter-governmental cooperation embodied within the OCS, a tactic which risked sending the country back to another phase of offshore disputes.

¹⁹ *Hansard*, House of Representatives, 20 March 1986, p 1780.

The very considerable time between conceiving the OCS and bringing it into effect had the effect of forestalling the integration of the Settlement's various packages. As a consequence of the difficulties in finalizing some of the agreed arrangements, the character of the OCS shifted from its organic conception to a series of sectoral models.²⁰ The marine resources components of the OCS are described very briefly here while the environmental policy models are discussed in part 5.3. An elaborate account of their development is found in Haward.²¹

The P(SL)A regime was settled very rapidly, notwithstanding the delay in enacting the necessary legislation. As described in Chapter Four, the ease in settling the offshore petroleum legislation was due largely to the fact that only Victoria—and to a growing extent Western Australia—had tangible interests in offshore development.²² The Commonwealth also enacted legislation creating a parallel regime for the development of hard seabed minerals located on the continental shelf, modelled very closely upon the amended P(SL)A regime. The offshore minerals regime was described by the Commonwealth in the following manner –

The *Minerals (Submerged Lands) Act* 1981 was passed in June, completing the legislation action by the Commonwealth to implement the offshore mining arrangements agreed with the States. The new legislation follows very closely the general approach adopted in the offshore petroleum legislation.²³

Although the *Minerals (Submerged Lands) Act* was enacted very easily—partly in recognition of an identified industry need—the legislation was not

²⁰ D. Rothwell and M. Haward, "Federal and International Perspectives on Australia's Maritime Claims" (1996) 20 *Marine Policy* 29-46.

²¹ Haward, *op cit* fn 15 pp 214-265.

²² R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (The Federation Press, Sydney, 1990) p 68; B. Opekin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395-431.

²³ Department of National Development and Energy *Annual Report 1980-81* (AGPS, Canberra, 1981) p 22.

proclaimed and brought into force for nine years. Stewart attributed this delay to the later realization that offshore minerals development generally lacked commercial viability, despite industry's earlier enthusiasm for the legislation.²⁴ Indeed, the failure of state governments to enact reciprocal legislation—being those jurisdictions responsible for regulating onshore minerals activity—illustrates their indifference in pursuing offshore minerals exploration. Not long after finally becoming operational, the *Minerals (Submerged Lands) Act* was repealed and replaced by a modernized version, the *Offshore Minerals Act*, in concert with the Law of the Sea Convention entering into force [more later].

In contrast to the enactment of legislation for continental shelf resources fisheries arrangements took an extraordinarily long time to settle. The OCS provided for four types of management regimes –

- Commonwealth management from the low water mark to the limit of the AFZ;
- management by states throughout this same area;
- joint authority management by both governments throughout the AFZ under either Commonwealth or state law; and
- status quo management, whereby the states manage fisheries within coastal waters and the Commonwealth assumes responsibilities in its waters beyond.²⁵

While it took until 1987 for OCS arrangements to be reached between the Commonwealth and five states as to the particular jurisdictional formula to be adopted for each fishery, New South Wales is yet to enter into such arrangements.²⁶ The diversity of state approaches and management practices—stemming from colonial times—frustrated OCS negotiations over

²⁴ J. Stewart, "Offshore Minerals Act" (1991) 10 *Australian Mining and Petroleum Law Association Bulletin* 90-96.

²⁵ N. Evans and S. Bache, "Bycatch of Endangered Species: Jurisdiction and the Management of Fishing Activities" (1997) 14 *Environmental and Planning Law Journal* 468-473.

²⁶ Anon., "OCS now extends to five States" (1987) 46 *Australian Fisheries* 16-17.

fisheries responsibilities, the same difficulty that confronted the Commonwealth when it first entered the fisheries policy area in 1953. It should be emphasized, though, that state governments were reluctant to agree to fisheries arrangements wherein the Commonwealth was the superior offshore partner.²⁷ The fact that all states had interests in fisheries management distinguished this sector from petroleum development.

5.2 THE PETROLEUM (SUBMERGED LANDS) ACT AMENDMENTS

5.2.1 Overview of the Hawke Government and offshore petroleum

Because few states gained any material benefit from offshore development it was therefore inevitable that interest in maintaining an integrated policy approach would wane as each government re-evaluated its priorities over the 1980s. Within this context, the Commonwealth amended the P(SL)A to ensure that its interests would prevail in the event of disagreement with the states over offshore petroleum policy. From 1983, the Commonwealth has opted for a series of amendments to consolidate its offshore decision-making capabilities rather than usher in a complete (fourth) overhaul of the regime.

The approach has been to amend from within the jurisdictional framework, thereby avoiding further conflict and litigation which wholesale repeal of the framework would provoke. The success of the Commonwealth's legislative program over the 1980s bears testament to its improved policy-making capabilities. While the *Petroleum (Submerged Lands)* regime has survived intact since the time that the OCS was implemented, the internal structure of the regime has been substantially amended from that originally enacted under the OCS. These amendments sought to firstly redefine the role

²⁷ M. Haward, "The Commonwealth in Australian Fisheries Management: 1955-1995" (1995) 2 *The Australasian Journal of Natural Resources Law and Policy* 313-325. See also: *The Last Frontier: Managing Commonwealth Fisheries* (House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs, Canberra, 1997).

of the Commonwealth and states in decision-making, and then serve notice to industry that it was dealing with a more forceful Commonwealth.

5.2.2 Reforming the joint and designated authorities

The *Petroleum (Submerged Lands) Act* was amended on three occasions during the 1980s to redefine the role of the Commonwealth and states in offshore petroleum policy. These amendments were substantially concerned with replacing the designated authority with the joint authority, thereby ensuring that both spheres of government—rather than the states acting alone, a legacy of the 1967 Settlement—were responsible for exercising Commonwealth powers in respect of the continental shelf.

5.2.2.1 Redefining the designated authority's power to direct

The first amendments to the P(SL)A to readjust the roles of the Commonwealth and states were enacted little more than a year after the OCS legislation came into force. These amendments were concerned ostensibly with the power to vary the rate of petroleum production. Chapter Four described how considerable uncertainty surrounded the capacity of the designated authority to alter petroleum production under section 58 of the P(SL)A. Because this power resided with the designated authority it was assumed that the only test to be applied to decisions to alter production related to good oilfield practice. Broader policy directions could therefore not be considered by the designated authority when altering rates of production.²⁸

Argyle analyses the power in the following terms –

The discretion vested in the Designated Authority under the Commonwealth Act to direct a licensee to increase or reduce the rate at which the petroleum is being recovered from a licence area, whilst cast in the widest terms, would be read down by a court of review, in appropriate circumstances, as authorising *only* decisions based upon considerations of good oilfield practice. On a proper construction of the Commonwealth Act, good oilfield practice is an expression limited in its

²⁸ R. Argyle, "Governmental Powers Over Petroleum Recovery Rates-Offshore Western Australia" (1983) 15 *The University of Western Australia Law Review* 14-32.

application to methods of operations and does not extend to consideration of the national interest.²⁹

Argyle goes on to remark that the largely unfettered discretion embodied by section 58 would be interpreted by the courts on the basis of the bestowed Parliamentary intention of the policy objectives of the P(SL)A. The statute provides negligible assistance with this interpretation, however.³⁰ In other words, the legislation was poorly drafted with respect to the power to order offshore production to be varied. It was this poor drafting that led to the first major conflict between the two spheres of government over the exercise of powers under the OCS-amended P(SL)A.

In February 1984, the Victorian minister, acting as designated authority in pursuance of the ill-defined s 58 powers, approved a substantial increase in production from the Fortescue field in Bass Strait. Cullen observes that this decision did not coincide with the view of the Commonwealth, principally because it meant that the royalty collection due to the Commonwealth was minimized.³¹ As a consequence, the Commonwealth amended the P(SL)A to replace the designated authority with the joint authority as the responsible decision maker under section 58. The power to vary production was thereby removed from the exclusive province of the state governments to that of the Commonwealth and state ministers combined.³² As well, the amendments added to section 58 the authority for the joint authority to consider revenue generation when deciding to vary the rate of offshore production.³³ In combination, the 1984 amendments enabled the Commonwealth to give

²⁹ Ibid, p 15.

³⁰ Ibid.

³¹ Cullen, op cit fn 2.

³² E. Fitzgerald, "The Seaweed Rebellion: Federal-State Conflicts Over Offshore Energy Development in the United States, Canada, and Australia" (1992) 7 *Connecticut Journal of International Law* 255-309.

³³ *Petroleum (Submerged Lands) Amendment Act 1984* (Cth). See: *Hansard*, House of Representatives, 13 September 1984, p 1278.

effect to broad national priorities when making decisions relating to the production policies of individual operators.

It is also worth highlighting the bipartisan nature of these amendments. During parliamentary debates, the Minister Assisting the Minister for Industry and Commerce, John Brown, remarked –

I understand that the amendment has received the accord of the shadow Minister for Resources and Energy, Senator Chaney. I hope that the amendment covers all of the questions that were quite legitimately and sincerely asked ... As I understand it, this amendment, which has received accord from both sides in the other House, will in fact answer all those questions.³⁴

In spite of Victoria's opposition to the legislation, Brown's comment confirms that the Government's amendments were readily supported by the Federal Opposition. This observation in turn affirms the proposition made by this thesis that the P(SL)A has evolved to reveal the emergence of a defineable Commonwealth position with respect to offshore resources, rather than narrowly reflecting the preferred offshore policy of either political party in the Commonwealth sphere. The offshore policy of both political parties has become indistinguishably different with the passage of time.

5.2.2.2 Replacing the designated with the joint authority

The second set of legislative reforms to the allocation of jurisdiction under the P(SL)A were enacted in 1987. These amendments were similar in purpose and effect to the 1984 amendments, but redefined the roles of the joint and designated authorities across virtually every area of offshore policy and administration.³⁵ As well, the special arrangement entered into between Western Australia and the Commonwealth was repealed.

³⁴ *Hansard*, House of Representatives, 10 October 1984, p 2073.

³⁵ M. White, *Marine Pollution Laws of the Australasian Region* (The Federation Press, Sydney, 1994).

The Hawke Government's review of the OCS was finally completed and reported in Parliament in 1987, four years after being commenced. At about the same time, Victoria and the Commonwealth were clashing over decisions made by the designated authority which affected the distribution of revenue from offshore development in Bass Strait, leading swiftly to judicial challenge.³⁶ In hindsight, the Victorian litigation merely confirmed the Commonwealth's view that it should prevail in relation to offshore petroleum policy, especially in terms of decisions made under the P(SL)A. The conclusion of these two events—the OCS review and litigation over decisions made by the designated authority—encouraged the Commonwealth to amend the P(SL)A so as to curtail the roles of Western Australia and the designated authority in the continental shelf regime.

When introducing the findings of the review in Parliament, the Minister for Primary Industries and Energy, John Kerin, announced that notwithstanding Labor's philosophical objection to the OCS, the sectoral arrangements thereunder were to be continued largely intact, endorsing the preliminary view of the Government introduced earlier. However, Minister Kerin indicated that changes of a substantial nature to the P(SL)A would be enacted as a result of the OCS review. In other words, the OCS framework was to be retained—although it was never likely to be dismantled, for the reasons canvassed earlier—but the P(SL)A regime would be amended to enhance the role of the Commonwealth. Kerin announced that –

The outcome was that the Government considered that the arrangements entered into by the Commonwealth with the States and the Northern Territory to administer activities in Australia's offshore waters were working satisfactorily, and the Government therefore decided not to take action to regain title over the territorial sea and

³⁶ In the case *BHP Petroleum v. Balfour* (1987) 61 ALJR 345 the High Court held that the designated authority had erred in a determination as to the location of a wellhead, with implications for revenue generation. Similarly, the Federal Court in *Fordham and the State of Victoria v. Evans and others* [unreported judgement, 13 November 1987] rejected the appeal by Victoria against a direction made by the joint authority, much to the chagrin of the designated authority. See: Cullen, op cit fn 2.

coastal waters. The review of the OCS did, however, identify certain administrative functions in the Commonwealth's offshore petroleum legislation which required change. These changes are to repeal the special arrangements with Western Australia whereby disagreements in the Joint Authority—the Commonwealth and relevant State Minister—are resolved on a Premier–Prime Minister basis; and to allow those matters which were previously dealt with by the Joint Authority at the discretion of the Commonwealth Minister, to become automatically matters for Joint Authority decision.³⁷

The amendments were easily drafted and passed by Parliament despite the profound changes that these effectuated to the offshore petroleum regime. Firstly, Western Australia's privileged position was removed by repealing from the P(SL)A the relevant Schedule 4 and the corresponding part of the statute giving legal effect to the special arrangements [s 8(D)(9)]. Transferring a suite of designated authority powers and functions to the purview of the joint authority was similarly achieved by repealing Schedule 5—wherein were listed those matters that could be referred by the Commonwealth minister to the joint authority—and the enabling provision, section 8E.³⁸ The outcome of these changes was that Western Australia no longer enjoyed the dominant position it did in terms of petroleum development on the adjacent north-west continental shelf. As well, the states more generally lost those exclusive offshore decision-making powers belonging to the designated authority, which now became the province of the Commonwealth and states combined as the joint authority.³⁹

With respect to the section 8E repeal, Minister Kerin stated that matters with the potential to be referred by the Commonwealth from the designated to the joint authority at the latter's discretion had become dealt with

³⁷ *Hansard*, House of Representatives, 23 September 1987, p 584.

³⁸ *Petroleum (Submerged Lands) Amendment Act 1987* (Cth) ss 4, 5.

³⁹ The powers resumed from the designated included those relating to: advertising the availability of exploration blocks [ss 20(1), (2)]; renewing permits to explore [s 31(5)]; notifying of available production licences [s 39A(5)(b)]; inviting applications to apply for surrendered production licences [s 47]; and carrying out of works [s 57].

administratively as if these had to be so handled.⁴⁰ This practice occurred so as to avoid the delays associated with a formal referral, resulting in some confusion amongst operators as to the authority responsible for particular approvals decisions.⁴¹ It was noted that the amendment would merely formalize what had become operational practice while reserving to the Commonwealth the ability to ultimately prevail in offshore policy, consistent with its position as national government with jurisdiction over the continental shelf –

Our experience has been that, where a joint authority has been involved in decisions, the consultative provisions of the offshore petroleum legislation which are generally applicable have proved entirely satisfactory.⁴²

The other major jurisdictional amendment to the P(SL)A effected in 1987 was the revocation of Western Australia's favoured position. The Government rejected that state's claim that the importance of offshore petroleum necessitated the existence of special arrangements beyond those more generally applicable.⁴³ One representative reflected the Hawke Government's view that the Commonwealth should redefine its offshore responsibilities *vis-a-vis* those of Western Australia –

I know that there is a joint agreement with Western Australia. I understand that the Minister has said that Western Australia should not be given a privileged position, that it ought to be in the same sort of position as other states ... Whilst there has to be consultation and co-operation and whilst the joint authority should be used to the maximum, if there is prolonged disagreement someone has to make a decision. I think that as we have many other joint authorities involving the States and the Commonwealth, the buck has to stop somewhere. In this instance the buck must stop with the Commonwealth.⁴⁴

⁴⁰ *Hansard*, House of Representatives, 23 September 1987, p 584.

⁴¹ One backbencher [Keith Wright] bemoaned that "There were hold-ups in the decision-making process ... bureaucratic rules that can make life in the market place unnecessarily difficult. This legislation is going down that track to remove those anomalies." *Hansard*, House of Representatives, 21 October 1987, p 1228.

⁴² *Hansard*, House of Representatives, 23 September 1987, p 585.

⁴³ *Hansard*, House of Representatives, 23 September 1987, p 584.

⁴⁴ *Hansard*, House of Representatives, 21 October 1987, p 1228.

The most remarkable aspect to this amendment was the silence it generated in Parliament. In the course of two hours of parliamentary time devoted to the bill the content of this amendment was scarcely mentioned, let alone being the subject of any debate.⁴⁵ Clearly, the Commonwealth had a settled view of the form that the P(SL)A regime should assume, and the legislation was the means by which to achieve this vision. The circumstances which supported the Hawke Government in its endeavours, however, were a function of politics and geography.

In terms of political influences on the amendment, one Opposition backbencher [Warwick Smith] observed the lack of attention given to the repeal of Schedule 4. He remarked that this parliamentary indifference was largely a function of the tenor of the political relationship between the Commonwealth and Western Australian leaders –

It is most interesting that we have not heard from Premier Burke about this legislation. It is very puzzling to know why ... Western Australia has a special arrangement existing at present, and that will be changed. It is surprising that we have not heard from Premier Burke. The Western Australian Liberal Government in 1980 agreed to it only on the basis of special arrangements ... Under the arrangements relating to the joint authority set in place to determine a lot of the issues involved with off-shore exploration, any problems were to be resolved on a Premier-Prime Minister basis. That has now been removed. One may well speculate that that is because Mr Burke no longer gets on well with the Prime Minister.⁴⁶

The second factor which encouraged the Commonwealth to revoke Western Australia's favoured status was geographical. It has been stated several times previously that the north-west shelf burgeoned as the centre of offshore oil activity during the late 1970s. Several authors recognise that the location of offshore oil fields and the extensive Australian coastline have influenced the

⁴⁵ See: *Hansard*, House of Representatives, 21 October 1987, p 1186.

⁴⁶ *Hansard*, House of Representatives, 21 October 1987, pp 1182-1183.

shape of the P(SL)A over time.⁴⁷ In 1987, the fact that offshore oil prospectivity was increasingly limited to the north of Western Australia, and therefore of no interest to the politically influential but unproductive eastern states, enabled the Commonwealth to follow its legislative path without fear of political backlash. An Opposition backbencher [Austin Lewis] was moved to comment in Parliament that "if New South Wales had offshore oil this Bill would not have been introduced".⁴⁸

5.2.2.3 *The delegation of joint authority powers*

A third amendment to the jurisdictional components of the P(SL)A was enacted in 1991. This amendment was designed to relieve ministers of some of their decision-making duties by empowering them to delegate powers to agency executives. Evans and Bailey have analyzed joint authority decisions, and established that Commonwealth and state ministers since 1989 have become increasingly burdened by approving changes to the ownership of resource titles rather than making policy decisions relating to the pace and scale of offshore development.⁴⁹ In response to this emerging pattern, the P(SL)A was substantively amended by Parliament in 1991. Legislation enacted in that year enabled the joint authority ministers to delegate to agency executives all their powers, including those pertaining to leasing and development decisions.⁵⁰

Chapter Three discussed some of the inter-governmental tensions experienced by the Australian Minerals and Energy Council—the ministerial body overseeing offshore petroleum development—during the life of the Whitlam Government. Consistent with the cooperative spirit of the OCS, the

⁴⁷ N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204; Opeskin and Rothwell, op cit fn 22.

⁴⁸ *Hansard*, Senate, October, p 1328.

⁴⁹ Evans and Bailey, op cit fn 47.

⁵⁰ *Petroleum (Submerged Lands) Amendment Act 1991* (Cth) s 3.

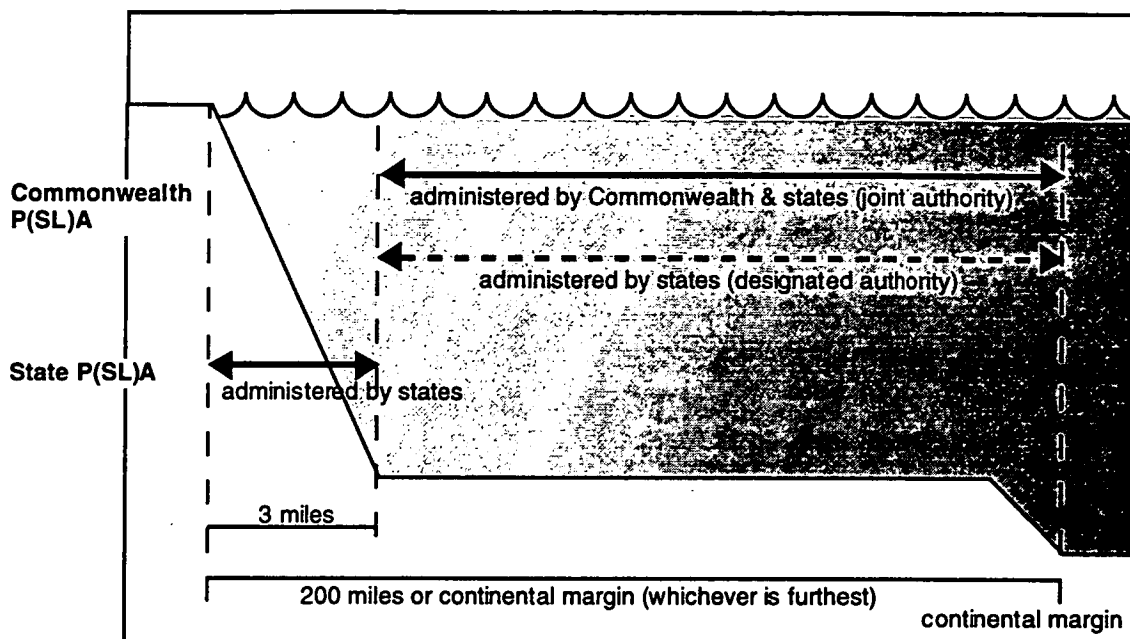
Standing Committee on Offshore Petroleum Legislation was established by AMEC in 1981. Comprised of senior officials from all governments, the function of the Standing Committee is to facilitate decision-making harmony between the Commonwealth and states with respect to both routine administration of titles and common petroleum policy issues.⁵¹ Hunt is one author to recognise the success of the AMEC Standing Committee since its establishment.⁵² It was these officials who were bestowed with joint authority powers and functions by the 1991 P(SL)A amendments.

The most immediate effect of the amendment legislation was to relieve the two ministers of having to approve the exchange of mining titles amongst oil companies, a function better managed by agencies without incurring the delay associated with ministerial approval. Because of this delegation of power, many joint authority decisions post-1991 were made by the Standing Committee rather than by the Commonwealth and state ministers. Following from this fact is a second, more important observation relating to the argument of this thesis. The act of legislatively endorsing the delegation of ministerial decision-making powers to senior agency staff underscores the success of the cooperative governance model. Only if the Commonwealth was confident with offshore decision-making arrangements would Parliament provide the ministers—as the joint authority—with the capacity to divest their executive powers to the exercise of agencies. The amended P(SL)A regime is shown in Figure Five.

⁵¹ Department of Resources and Energy *Annual Report 1982-83* (Australian Government Publishing Service, Canberra, 1983).

⁵² Hunt, *op cit* fn 3.

Figure 5. Commonwealth-state offshore petroleum arrangements 1995



Parliamentary debates confirm that by 1991 joint ministerial decisions were becoming almost routine under the enabling legislation.⁵³ Indeed, the Minister for Resources, Alan Griffiths, introduced the bill by lauding the power to delegate as streamlining administration without weakening ministerial authority over decisions, as disagreements would have to be referred back to joint authority ministers.⁵⁴ The statutory delegation of responsibilities therefore represents a logical maturation of the P(SL)A.

5.2.3 Commonwealth policy towards industry

In addition to redefining its role in offshore policy relative to state governments, the Commonwealth also legislated to substantially reform the terms of its interaction with offshore operators. These amendments are introduced here to further convey the tenor of the Commonwealth's interaction with industry as the offshore petroleum regime continued to mature during the latter part of the 1980s.

⁵³ *Hansard*, House of Representatives, 8 May 1991, p 3262.

⁵⁴ *Hansard*, House of Representatives, 8 May 1991, p 3262.

5.2.3.1 *The resource rent tax*

The first Hawke Government amendment involving offshore petroleum to offend industry was the resource rent tax (RRT). The RRT was an election commitment of Labor's to overhaul the existing royalty and excise regimes applying to offshore petroleum.⁵⁵ Neither state governments nor industry were favourably disposed to the notion of a RRT, which was considered as a disincentive for future offshore activity.⁵⁶ Even sympathetic Labor state governments were outspoken against the Commonwealth's proposal.⁵⁷ Nonetheless, the Hawke Government persevered in its policy to enact an RRT regime, and after considerable negotiations finally released a modified proposed tax that would apply to greenfields projects discovered after 1st July 1984 rather than to existing projects. An explanatory memorandum published by the Commonwealth identifies some of the influences on the eventual shape and form of the RRT –

Consultations were held with the industry and the States, and detailed written comments were received on the various issues raised by the Government's papers. Following those consultations and further deliberations, the Government has decided to narrow the focus of its RRT proposal to new offshore petroleum projects. The Government will maintain the current excise/royalty regime for existing offshore and onshore petroleum projects, including Bass Strait and the North West Shelf, and impose a separate lower excise regime on "new" oil from existing projects.⁵⁸

The important point to be appreciated regarding the RRT is that the Commonwealth was able in the mid-1980s to promote its preferred offshore policy through legislation, in spite of the opposition of industry and state governments. This situation is contrasted to that existing twenty years earlier when the Commonwealth was seen to defer heavily to both of these influences

⁵⁵ A. Church, *Natural Resource Taxation Policies* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1985).

⁵⁶ Cullen, op cit fn 2; Haward, op cit fn 15 pp 214-226.

⁵⁷ B. Head, "Economic Development in State and Federal Politics", in B. Head (ed), *The Politics of Development in Australia* (Allen & Unwin, Sydney, 1986) pp 3-55.

⁵⁸ *Outline of a "Greenfields" Resource Rent Tax in the Petroleum Sector* (Australian Government Publishing Service, Canberra, 1984) p 1.

because of its own offshore incapacities. Haward documents the influence of two Commonwealth ministers—Peter Walsh and especially Gareth Evans—in gaining the confidence of the oil industry upon assuming the resources portfolio early in the Hawke Government.⁵⁹

The Commonwealth and industry operators disagreed with respect to the merits of an RRT. However, the personal efforts of the ministers to fully inform themselves about the associated issues, rather than relying upon the advice of the bureaucracy, was instrumental in building trust.⁶⁰ This brief overview of the RRT therefore provides the benchmark for Commonwealth offshore regulation in the 1980s, clearly in stark contrast to its interaction with industry in 1966-1967.

5.2.3.2 *The cash bidding regime*

A second, controversial amendment to the P(SL)A—to which industry was opposed—was the provision to enable cash bidding as an alternative method to the original work bidding arrangements for awarding exploration permits. Whilst the RRT and cash bidding were seen by the Government as closely related, industry treated the two policy reforms separately. The work program bidding system was introduced in 1967 to encourage offshore exploration at a time when little was known of offshore prospectivity. This system was based upon awarding permits to those applicants with the most ambitious offshore exploration proposals. The Hawke Government acknowledged that the work program system worked well, but considered it an inappropriate means for awarding exploration permits in areas that were highly prospective, or where initial assessments of prospectivity were subsequently disproved. Defects with the system identified by the Commonwealth included –

⁵⁹ M. Haward, *Institutions, Interests Groups and Marine Resources Policy* (University of Tasmania, MA thesis, 1986) pp 190-235.

⁶⁰ *Ibid*, p 232.

- companies artificially inflating exploration programs to ensure the success of a bid;
- difficulties with assessing the likelihood of an exploration program being completed as bidden; and
- the cost of government administration needed to maintain the credibility of the work program bidding system.⁶¹

Vast amounts of parliamentary time were devoted to the topic of cash bidding. The Hawke Government viewed cash bidding and the RRT as complementary measures designed to collect for the community a share of the economic revenue flowing from Australia's offshore petroleum resources.⁶² The oil industry and the Liberal Coalition were allied against cash bidding, however, arguing that the proposed system was inequitable and restrictive of offshore development. These polarised views of the cash bidding system were amply reflected in the comments of a Government backbencher, sounding surprisingly like comments expressed at each of the previous evolutionary periods of the P(SL)A –

Cash bidding is one way that the Australian people can receive some compensation for the resources that belong to all Austalians. These resources do not belong just to the petrol companies. They do not belong to the multinational oil cartel. They belong to all of us, and why should we not get some money back for them? From the way that members of the Opposition have spoken so far in this debate today one would think that Australia was already owned by Esso Australia Ltd or BP Australia Ltd or any other company in the multinational cartel. It is wrong that we just give away our resources to overseas companies for them to plunder and exploit. Those resources belong to all of us here, and we all should share in the wealth of Australia.⁶³

Much of the debate on the amendments was occupied by the Opposition's exhortations against cash bidding made on behalf of the offshore oil industry.⁶⁴ The major oil companies argued that cash bidding was a

⁶¹ *Proposed Amendments to the Petroleum (Submerged Lands) Act* (Department of Resources and Energy, Canberra, 1984).

⁶² *Hansard*, House of Representatives, 23 September 1987, p 588.

⁶³ *Hansard*, House of Representatives, 23 September 1987, p 1187.

⁶⁴ "The coalition opposes the whole concept of cash bidding. The industry, respresented by the Australian Petroleum Exploration Association Ltd and the Australian Institute of Petroleum

disincentive to exploration because it diverted economic rent from the production phase to Commonwealth revenue, as did the RRT. The Coalition also considered that the revenue raised from cash bidding would be less than that from taxes on production. Essentially, these two parties rejected cash bidding as being an ineffectual attempt to enact another impost upon offshore development.⁶⁵

In the event, the Hawke Government relied upon the support of a Democrat senator [Norm Sanders] to pass the legislation through the upper house. Sanders had been personally involved in disputatious battles over offshore development in the United States, and took a very practical view of the policy goals embodied in the legislation.⁶⁶ In terms of the evolving maturity of the P(SL)A regime, the important point to arise from this debate is the Commonwealth's resolve to enact the legislation creating the cash bidding system in spite of the intense objections it generated. In Hunt's view, this activity further demonstrates the Commonwealth's growing confidence and assertiveness with advancing its own offshore priorities.⁶⁷

5.2.3.3 *Setting conditions and providing information*

Two separate amendments to the P(SL)A during the 1980s were directed at increasing the Commonwealth's control over the oilfield practice of operators. Firstly, several provisions were amended in 1987 to enable information on petroleum reserves to be made more readily available. The period for which information could be kept secret was reduced in 1984 from five to two years [s. 118]. As well, section 122 of the P(SL)A was amended to allow the Commonwealth to exercise greater control over the information

Ltd, opposes it. The Northern Territory Government opposes it. The Western Australian Government opposes it." *Hansard*, House of Representatives, 21 October 1987 p 1182.

⁶⁵ *Hansard*, House of Representatives, 21 October 1987, pp 1182-1184, 1233 .

⁶⁶ Haward, op cit fn 59 p 214.

⁶⁷ Hunt, op cit fn 3.

collected by offshore operators.⁶⁸ Prior to this amendment, the state minister was empowered to direct an operator to provide the designated authority with information regarding a current operation. The Commonwealth amended this section in 1987 to allow the Commonwealth minister to now direct the designated authority in this regard.

The second set of amendments—two years later—involving interaction with industry pertained to the imposition of conditions on instruments granted under the P(SL)A.⁶⁹ Previously, the holder of an instrument could generally assume that an offshore title would be renewed absent any gross violation of a condition imposed by the joint authority. In 1989, the onus for complying with conditions was essentially reversed so that non-compliance became almost fatal to the renewal of any offshore title.⁷⁰

Unlike many of the other industry-related amendments to the P(SL)A, these 1989 amendments attracted little attention in Parliament. It is likely that the low level of parliamentary interest in condition-setting amendments was attributable to the far greater attention being given to proposed changes to the revenue and fee structure dimensions. The lack of parliamentary attention did later lead to problems at the operational level. Since the amendments to condition-setting in the late 1980s, the joint authority has had to vary or suspend the conditions attached to at least several resource titles in order to enable the title-holder to exercise rights to explore for petroleum.⁷¹

⁶⁸ *Petroleum (Submerged Lands) Amendment Act 1987* (Cth) s 15.

⁶⁹ *Primary Industries and Energy Legislation Amendment Act* (No. 2) 1989 (Cth) Sch 1.

⁷⁰ M. Crommelin, "Mining and Petroleum Titles" (1988) 62 *The Australian Law Journal* 863-877.

⁷¹ Department of Primary Industries and Energy *Annual Report 1991-1992* (Australian Government Publishing Service, Canberra 1992).

5.2.4 Trends in revenue sharing

Monitoring changes in the distribution of petroleum revenue between the Commonwealth and states serves as a useful barometer of the evolution of the P(SL)A regime. Table One reports the available information relating to Commonwealth petroleum revenue since records were maintained soon after the original Settlement was reached in 1967. Two aspects in particular are highlighted by revenue-sharing arrangements: the changing importance over time of prospective areas around the coastline; and the prominence of Western Australia as an offshore partner.

Perhaps the most notable observation from the table is the growth and decline in royalties derived from Bass Strait [notwithstanding the incomplete availability of data]. The productivity of Bass Strait peaked in the mid-1980s, reflecting the inflated price of oil during the later part of the 1970s.⁷² Subsequent to this time, the emergence of the North West Shelf as the dominant oil-producing offshore area is clearly shown. More importantly, it can be seen that a substantial portion—indeed, the majority—of petroleum receipts generated by the Commonwealth through its superior revenue-raising capabilities is returned to the states.

Within Western Australia's coastal waters, revenue is returned to the state in the ratio of 60:40 percent, as originally agreed in the 1967 Settlement. The rate of return is even greater in relation to production on the adjacent Commonwealth North West Shelf, where revenue-sharing arrangements are enshrined in legislation.⁷³ Since the North West Shelf became productive in 1990, Western Australia has consistently received at least 70% of secondary

⁷² Although oil prices peaked in 1980, delays in aligning production with price, coupled with the latency inherent in revenue-raising mechanisms, means that several years elapse between oil price fluctuations and revenue collection.

⁷³ The *Petroleum (Submerged Lands) Act 1967* (Cth) explicates very complex formula by which the Commonwealth repays to the states a proportion of the value of production revenue within its waters as payment for administering the offshore petroleum regime [ss 129, 130].

revenue raised from this Commonwealth area. The tenacity of Premier Court in negotiating the OCS arrangements has clearly realised dividends for the state that have long transcended the term of his government, with no indication of this trend abating, moreover.⁷⁴

It is also worth noting from Table One the effect of the resource rent tax, discussed in the previous section. Since the RRT was introduced early in the 1990s, the older crude oil levy has disappeared as a secondary revenue-raising levy. Additionally, it is apparent that offshore oil development has accreted and receded over thirty years as a source of revenue for the Commonwealth. The collection of offshore petroleum revenue is subject to the vicissitudes of oil prices. Notwithstanding the steady increase over time in barrel price—and therefore the overall importance of offshore petroleum to the Commonwealth—considerable fluctuation is experienced at the scale of individual years, with consequences for the Commonwealth's earnings. A detailed account and analysis of revenue dimensions is outside the ambit of this thesis, however.

⁷⁴ Premier Court is taken to mean Sir Charles Court, who was responsible for negotiating the special conditions under the OCS applicable only to Western Australia [as discussed previously], and is not a reference to his son and later premier during the 1990s, Richard Court.

Table 1. Commonwealth/state secondary petroleum revenues 1969-1998 (\$ M) [data held by Dept Industry, Science & Resources, Canberra]

Year	WA coastal waters		Commonwealth waters			Crude Oil Levy/RRT ³	Total Cth Revenue
	WA share (60%)	Cth share (40%)	North West Shelf (WA share) ¹	Barrow Island	Bass Strait ²		
1969/70					3		3
1970/71					10		10
1971/72					20		20
1972/73					24		24
1973/74					30		30
1974/75					36		36
1975/76					40	257	297
1976/77					45	340	385
1977/78					58	469	527
1978/79					78	1226	1304
1979/80					110	2270	2380
1980/81					152	3108	3260
1981/82					166	3164	3330
1982/83					174	3468	3642
1983/84					224	3651	3875
1984/85					276	4202	4478
1985/86					333	4019	4352
1986/87					254	2062	2316
1987/88					266	2056	2322
1988/89					159	1188	1347
1989/90					251	1232/42	1525
1990/91	40.5	27	19 (14.3)	25	266	1354/293	1984
1991/92	37.5	25	19 (18.5)	25	13	64/876	1021
1992/93	33	22	22 (17.0)	20	N/A	116/1389	1566
1993/94	13.5	9	51 (42.4)	22	N/A	62/1072	1217
1994/95	28.5	19	81 (65.9)	13	N/A	27/865	1004
1995/96	27	18	161 (112.6)	12	N/A	13/791	1002
1996/97	24	16	256 (187.1)	15	N/A	10/1310	1607
1997/98	21	14	303 (215.9)	7	N/A	15/906	1245

1 North West Shelf (WA) indicates the total revenue collected by the Commonwealth and the amount returned to Western Australia as per the formula specified in ss. 129, 130 of the *Petroleum (Submerged Lands) Act 1967* (Cth) [approximately two-thirds of NWS royalties are returned to WA].

2 Bass Strait royalties include Western Australian OCS coastal waters royalty component between 1983 and 1990, and are subsumed within the RRT after this time.

3 The crude oil excise was replaced by the resource rent tax in 1990 [refer text], since which time the levy has been applied only to "old oil" [production that pre-dated the new secondary tax regime] and declined in importance as a source of revenue.

5.3 COMMONWEALTH OCEAN AND COASTAL POLICY UNDER HAWKE

5.3.1 Commonwealth intervention in environmental policy

A number of ocean and coastal policy actions over the 1990s had implications for the offshore petroleum regime. To appreciate the relevance of these initiatives it is necessary to first overview the general thrust of environmental policy-making pursued by the Hawke Government. As occurred in the area of offshore petroleum policy, the Commonwealth similarly expanded into the traditional preserves of state government environmental policy making during the 1980s. The first and most infamous such move was the Hawke Government's action to halt construction of a dam on the Gordon-below-Franklin River in south-west Tasmania, a pre-election promise which helped propel Labor to victory in the 1983 federal election.

The saga of the Tasmanian Dams case has entered the corpus of environmental folklore in Australia, as evidenced by the volume of literature devoted to this event.⁷⁵ The means the Commonwealth employed to prevent the dam being constructed was to enact the *World Heritage Properties Conservation Act* 1983 (Cth), based upon the World Heritage Convention.⁷⁶ Tasmania challenged the *World Heritage Act* in the High Court, which upheld the legislation was upheld as being a valid exercise of the external affairs head of power.⁷⁷ Subsequent to this early legislative action

⁷⁵ G. Bates, *Environmental Law in Australia* (Butterworths, Sydney, 1992); B. Davis, "Environmental Management", in B. Galligan, O. Hughes and C. Walsh (ed), *Intergovernmental Relations and Public Policy* (Allen and Unwin, Sydney, 1991) pp 146-162; N. Economou, "Problems in Environmental Policy Creation: Tasmania's Wesley Vale Pulp Mill Dispute", in K. Walker (ed), *Australian Environmental Policy* (New South Wales University Press, Kensington, 1992) pp 41-57; R. Fowler, "Environmental Law and its Administration in Australia" (1984) 8 *Environmental and Planning Law Journal* 10-49; A. Kellow, "The Environment, Federalism, and Development: Overstated Conflicts?", in K. Walker (ed), *Australian Environmental Policy* (New South Wales University Press, Kensington, 1992) pp 203-214.

⁷⁶ Convention for the Conservation of the World Natural and Cultural Heritage.

⁷⁷ *Commonwealth v Tasmania* (1983) 153 CLR 1.

the Commonwealth continued to intervene to protect the outstanding conservation values of rainforests in Queensland, as well as entering into a number of other environmental disputes.⁷⁸

5.3.2 Environmental accordism under Hawke

As a result of this interventionist approach, deep divisions set in between the Commonwealth and states over land use and resources policy, as well as amongst federal agencies and key stakeholder groups. By the decade's end environmental policy-making was clearly in need of repair, out of which evolved a new paradigm, environmental accordism.⁷⁹ This new approach to environmental policy comprised three main components: ecologically sustainable development (ESD), the Inter-Governmental Agreement on the Environment, and the Resource Assessment Commission.⁸⁰ The lattermost of these models is described here because of its particular relevance to the marine and coastal environment and offshore development.

⁷⁸ Bates, *op cit* fn 72.

⁷⁹ D. Downes, "Neo-Corporatism and Environmental Policy" (1996) 31 *Australian Journal of Political Science* 175-190; N. Economou, "Accordism and the Environment: The Resource Assessment Commission and National Environmental Policy-Making" (1993) 28 *Australian Journal of Political Science* 399-412.

⁸⁰ The Ecologically Sustainable Development Working Groups were established by the Commonwealth in 1989 in response to the World Commission on Environment and Development (the Brundtland Report). Nine cosmopolitan expert working groups were charged with reviewing the status of each major sector of activity with respect to ecological sustainable development, and proposing options for reforming these sectors so as to better achieve sustainability. Downes describes ESD in the following terms: "The ecologically sustainable development process represented Australia's most concerted attempt to form a broad environmental strategy. Importantly, it also signified the effort by the Hawke Labor government to involve key protagonists in the environment-development debate—notably business and environmental organisations—through participation in a governmental consultation process." *Ibid*, Downes p 175. The Inter-governmental Agreement on the Environment was a document signed by all Australian leaders in 1992 which specified the roles and responsibilities of each jurisdiction in terms of protecting the environment. Although neither of these approaches found their basis in legislation they nonetheless generated a lot of interest, and influenced all stakeholders to enter into a more explicit dialogue when developing environmental policy.

5.3.2.1 The Resource Assessment Commission

The Resource Assessment Commission (R.A.C.) was a statutory body created by the *Resource Assessment Commission Act 1989* (Cth) as an attempt by the Hawke Commonwealth to seek alternative ways of settling disputes over resources development. Economou articulates the context within which the R.A.C. was legislation was enacted –

The emergence of the RAC signalled a critical coincidence of the arrival of the environment as a policy issue of some national importance with the Hawke government's success in applying the structures and mechanisms of consensus politics to other problematic policy arenas. The nature and—more importantly—the conduct of environmental policy politics stood as something of an antithesis to the Hawke government's approach to economic policy and industrial relations ... It is clear that national environmental policy was dominated by purely pragmatic considerations in which cabinet's basic commitment to growth and economic development was tempered by acceptance of the argument emanating from environmental leaders and its own opinion polling that the environment commanded an electorally significant constituency whose support Labor enjoyed by virtue of its decision in 1983 to prevent hydro-development of Tasmania's Franklin dam.⁸¹

The principal means through which the R.A.C. was to achieve dispute settlement was by conducting public inquiries at the referral of the prime minister. Schedule 1 of the *Resource Assessment Commission Act* stipulated that the R.A.C. should take an integrated approach to conservation and development, deeming that the net benefits to society of resource use should be primary in decision making. At the conclusion of an inquiry the R.A.C. reported to the prime minister, who could then make a decision based upon transparent information gathered and presented through vigorous debate. Herein lay the strength of the R.A.C..⁸² The integrity of the R.A.C., guaranteed by its mandate and method, enabled it to conduct inquiries into three highly

⁸¹ N. Economou, "Australian Environmental Policy Making in Transition: the Rise and Fall of the Resource Assessment Commission" (1996) 55 *Australian Journal of Public Administration* 12-22, pp 13-14.

⁸² D. Stewart and G. McColl, "The Resource Assessment Commission: An Inside Assessment" (1994) 1 *Australian Journal of Environmental Management* 12-23.

contentious areas of resources policy, including the coastal zone [more later].⁸³

5.3.2.2 *Inquiries into Australian coastal management*

Before examining the R.A.C.'s inquiry into the coastal zone and its contribution to Commonwealth coastal policy, it is helpful to briefly revisit the scope of the Offshore Constitutional Settlement. It has been identified earlier in this thesis that the OCS deferred heavily to the sensitivities of states in a range of marine policy areas outside the resource sectors, such as whale conservation and sea dumping. The Commonwealth made little effort to intrude into these non-peak policy areas, and was content to leave environmental responsibilities in coastal waters to be covered by state legislation.⁸⁴ This same approach was taken towards coastal management, an area of policy which the Commonwealth was reluctant to occupy both at that time and on several occasions since.

At the same time that the OCS was being finalized in 1980 a House Standing Committee completed a review of Australian coastal zone management.⁸⁵ The review urged the Commonwealth to formulate a national coastal policy, but was careful not to recommend any action which would encroach upon states' responsibilities, a mood which was clearly sympathetic to the OCS negotiations proceeding at the time.⁸⁶ Notwithstanding the possibility to at least usefully link the two developments, the report commented upon the OCS only in passing by

⁸³ Resource Assessment Commission, *Kakadu Conservation Zone Inquiry Final Report* (Australian Government Publishing Service, Canberra, 1991); *Forest and Timber Inquiry Final Report* (AGPS, Canberra, 1992); *Coastal Zone Inquiry Final Report* (AGPS, Canberra, 1994).

⁸⁴ R. Hildreth, "Managing Ocean Resources: New Zealand and Australia" (1991) 6 *International Journal of Estuarine and Coastal Law* 89-126.

⁸⁵ *Australian Coastal Zone Management* (House of Representatives Standing Committee on Environment and Conservation, Canberra, 1980).

⁸⁶ *Australian Coastal Zone Management*, Paragraph 198.

referring to the ongoing heads-of-government discussions. Indeed, from the text of the report it is apparent that the House Standing Committee was careful to express the Commonwealth's interest in coastal management as secondary to the joint authority arrangements being developed by AMEC.⁸⁷ As Hildreth remarks, coastal land use issues were clearly not a priority item in 1980, in spite of the attention being focussed further offshore.⁸⁸

Eleven years later another House of Representatives Committee delivered a second, slightly more insistent review of national coastal policy, entitled *The Injured Coastline*.⁸⁹ This report considered that the Commonwealth had three roles in coastal environmental protection, namely: broad policy making; the provision and distribution of research and information; and the supportive resourcing of programs.⁹⁰ However, despite noting that public participation in coastal management was limited to the environmental approvals process "... which did not always satisfy the demands of the community" the Committee still counselled against the Commonwealth adopting more accountable and participative models.⁹¹ *The Injured Coastline* instead "strongly believed" that the Commonwealth should initiate a national coastal strategy with the cooperation of state and local governments.⁹²

Quite clear from the review also was that the Commonwealth/state interface did not present problems for coastal environmental protection.⁹³ The extent to which problems did exist was attributable to decision making

⁸⁷ *Australian Coastal Zone Management*, Paragraph 174.

⁸⁸ Hildreth, op cit fn 81.

⁸⁹ *The Injured Coastline* (House of Representatives Standing Committee on Environment, Recreation and the Arts, Canberra, 1991).

⁹⁰ *The Injured Coastline*, Paragraph 6.10.

⁹¹ *The Injured Coastline*, Paragraph 3.38.

⁹² *The Injured Coastline*, Paragraphs 6.21-6.22.

⁹³ D. Crawford, "The Injured Coastline" - A Parliamentary Report on Coastal Protection in Australia. *Coastal Management*, 20 (1992) 189-198.

fragmentation due to arbitrary administrative boundaries between public agencies, and their failure to consider cumulative effects in decision making.⁹⁴ In other words, the vertical division of jurisdiction was not identified as a factor limiting the development of environmental policy in the coastal zone. To address these structural problems the Committee recommended that the Commonwealth should enact legislation specifying federal interests in the coastal zone and agreed national environmental guidelines.⁹⁵ In this context, the federal consistency clause of the U.S. Coastal Zone Management Act was explicitly contemplated and rejected by the Committee as a model for the Commonwealth to emulate. Almost certainly, the prospect of importing to Australia the policy gridlock existing offshore California dissuaded the Committee from recommending the adoption of similar legislation [discussed further in Chapter Seven].⁹⁶

The Injured Coastline clearly excused the Commonwealth from taking decisive legislative action in the area of coastal management. One commentator nonetheless enthused about the contribution to Commonwealth policy making of the parliamentary report –

The Injured Coastline probably represents an important turning point concerning the development of a national approach to coastal management in Australia. Unlike many federal parliamentary committee reports in Australia it has a strong likelihood of success in seeing its recommendations implemented.⁹⁷

The Injured Coastline elicited several government responses. Firstly, Prime Minister Hawke in 1992 directed the Resource Assessment Commission to undertake an inquiry into the coastal zone. It was hoped by the Government that the R.A.C. would provide a clear option for articulating the

⁹⁴ *The Injured Coastline*, Paragraphs 3.35-3.37.

⁹⁵ *The Injured Coastline*, Recommendation 12.

⁹⁶ R. Hildreth, "Australian Coastal Management: a North American Perspective" (1992) 9 *Environmental and Planning Law Journal* 165-174.

⁹⁷ Crawford, op cit fn 90. David Crawford served as secretary to the inquiry, and his enthusiasm for its outcomes needs to be interpreted in this context.

Commonwealth's role in coastal management.⁹⁸ The Commonwealth also prepared a draft coastal policy in light of the recommendations arising from *The Injured Coastline*, but was careful not to preempt the work of the R.A.C. Notwithstanding expectations which may have accompanied its investigation, when completed in November 1993 the R.A.C. *Coastal Zone Inquiry* largely repeated the findings of the 1991 House committee.⁹⁹ The *Coastal Zone Inquiry* recommended that the Commonwealth should take the lead in initiating a National Coastal Action Program as befitting its role as national government, but commented that –

[T]he Commonwealth, however, should not attempt to impose a uniform national coastal regulatory scheme. Rather, it should enact legislation to guide funding allocations by the Commonwealth to coastal zone management."¹⁰⁰

As a result of the exhaustive review completed by the R.A.C. over two years, the Commonwealth in 1995 contented itself—belatedly—with preparing a detailed coastal policy statement.¹⁰¹ The Commonwealth's coastal policy, *Living on the Coast*, was the Government's formal response to the reports of the House Standing Committee and the R.A.C., and the final version of the earlier draft coastal policy.¹⁰² *Living on the Coast* reiterated the proper roles of the different spheres of government in coastal management, with particular

⁹⁸ Despite its considerable potential as a model for natural resources policy making, the R.A.C. endured for only a brief period. Although the legislation remains on the statute books no prime minister has referred any matter to the RAC for investigation since the Coastal Zone Inquiry. Two factors seem to account for the demise of the RAC in natural resources policy making. The first is that the RAC was probably too successful in achieving its mandate of evaluating options for land use and providing unignorable advice to the government, given the rigour and transparency with which this was prepared and presented. The second reason why no further matters have been referred to the RAC is found in Hawke's 1992 deposition as Labor leader by Paul Keating. The new prime minister prioritized development and favoured an incisive rather than consensus style of decision making, which in turn saw the environment suffer as a policy area. See: Downes, op cit fn 76; Economou, op cit fn 78.

⁹⁹ *Coastal Zone Inquiry* (Resource Assessment Commission Final Report, AGPS, Canberra, 1993).

¹⁰⁰ *Coastal Zone Inquiry*. Paragraph 19.37.

¹⁰¹ R. Kay and C. Lester, "Benchmarking the Future Direction for Coastal Management in Australia" (1997) 25 *Coastal Management* 265-292.

¹⁰² *Living on the Coast - Commonwealth Coastal Policy* (Department of the Environment, Sport and Territories, Canberra, 1995).

emphasis on the cooperative arrangements reached under the OCS.¹⁰³ In terms of new initiatives to address coastal environmental problems, the policy articulated principles and objectives for coastal management, and committed some \$53 million in funding over four years while eschewing new legislative or administrative arrangements.¹⁰⁴

Several recent Australian commentaries have analysed the R.A.C. inquiry and the Commonwealth's resultant coastal policy.¹⁰⁵ Two important points emerge from these analyses confirm that coastal management would remain firmly under state jurisdiction. The first is the obvious strength of states' rights as given under the OCS, and the Commonwealth's desire to take credit for coastal initiatives without being additionally burdened. Kay and Lester describe this tendency in the following terms –

It is worth reflecting on the approach taken by the commonwealth to promote the coastal package. During the process of developing the intergovernmental coastal initiatives ... there was a strong feeling among the state representatives that the commonwealth was asking what it should do in coastal management so that it could attempt to do these things itself, thereby taking credit for any initiatives.¹⁰⁶

The second point from the Commonwealth's experience with coastal management relates to the particular form of the final settled approach. A number of reviews of coastal management were needed to motivate the government to enter this policy field, which it eventually did by releasing a policy statement and a modest amount of program funding. Aside from the

¹⁰³ *Living on the Coast*, section 2.1.

¹⁰⁴ *Living on the Coast*, section 4.2.

¹⁰⁵ B. Davis, "National Responses to UNCED Outcomes: Australia", in L. Kriwoken, M. Haward, D. VanderZwaag and B. Davis (ed), *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International, London, 1996) pp 25-40; M. Haward, "Institutional Framework for Australian Ocean and Coastal Management" (1996) 33 *Ocean & Coastal Management* 19-39; L. Kriwoken and R. Cote, "Developments in Australian and Canadian Marine Environmental Management", in L. Kriwoken, M. Haward, D. VanderZwaag and B. Davis (ed), *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International, London, 1996) pp 215-242.

¹⁰⁶ Kay and Lester, op cit 98 p 280.

strength of the OCS, in choosing not to enact legislation modelled on the CZMA the Commonwealth has likely looked to the United States and been influenced by the near breakdown there of the federal offshore oil leasing program. By keeping the policy areas of coastal management and petroleum development separate, the Commonwealth is able to ensure that its offshore interests continue to operate unfettered by inter-governmental tensions over coastal management policy.¹⁰⁷

5.3.2.3 *The Gunn's case*

The Commonwealth's approach to coastal management is also seen in the area of environmental impact assessment. Partly in reaction to the approach of the Keating Government to environmental decision making and the demise of the R.A.C., a non-government organization in 1994 challenged a Commonwealth decision in the Federal Court.¹⁰⁸ Although the case was concerned ostensibly with the export of woodchips, the precedent of the judgement extended to all areas of Commonwealth resources decisions made pursuant to the *Environment Protection (Impact of Proposals) Act 1974* (Cth).

The *Impact of Proposals Act* was introduced in Chapter Three as being enacted as one prong of the environmental policy of the Whitlam Government. The *Impact of Proposals Act* applies to federal decision making, namely projects undertaken by a Commonwealth instrumentality, those which require federal approval, or which occur in Commonwealth areas.¹⁰⁹ Administrative Procedures established under the parent statute provide the detail for determining both the need for and the requirements of an

¹⁰⁷ Evans and Bailey, op cit fn 47.

¹⁰⁸ *Tasmanian Conservation Trust v Minister for Resources and Gunns Limited*. Unreported, Federal Court of Australia, NG 536 of 1994, 10 January 1995.

¹⁰⁹ *Environment Protection (Impact of Proposals) Act 1974* (Cth) s 5.

environmental impact statement (EIS) and public environment report (PER).¹¹⁰

The *Impact of Proposals Act* represents a discretionary environmental strategy on the part of the Commonwealth.¹¹¹ At the time the legislation was enacted in the early 1970s the Commonwealth was keen to avoid the delays caused by NEPA in the U.S., and much as it had done in 1967 with respect to the original petroleum legislation, looked to the American experience.¹¹² One lesson the Commonwealth learnt was to avoid enacting legislation which exposed its decisions to judicial review, hence the emphasis upon ministerial and administrative discretion for specifying environmental impact assessment requirements, rather than this being prescribed in enforceable terms within the statute. As well, constitutional limitations as to the Commonwealth's capacity to legislate to intrude upon state decisions with respect to ELA defined the scope of the legislation.¹¹³ In the words of one commentator –

As a result ...the Australian system is characterised by an extraordinary amount of ministerial discretion, sporadic public involvement, and frequent calls for reform.¹¹⁴

¹¹⁰ Administrative Procedures under s 6 of the *Environment Protection (Impact of Proposals) Act* 1974 (Cth). The preparation of an environmental assessment document under the *Impact of Proposals Act* is very discretionary, being triggered solely by the "action minister". Under the Administrative Procedures, the minister whose department is either the proponent or is responsible for project approval determines whether a proposal will generate significant environmental impacts, and may therefore warrant formal assessment [Administrative Procedures paras 1.2.1, 9.5]. Upon completion of any assessment, the action minister shall then ensure that the recommendations arising from the ELA are "taken into account" and "given effect to" when implementing the proposal [*Environment Protection (Impact of Proposals) Act* 1974 (Cth) s 8].

¹¹¹ M. Crommelin, "Commonwealth Involvement in Environment Policy: Past, Present and Future" (1987) 4 *Environmental and Planning Law Journal* 101-112.

¹¹² M. Blumm, "The Origin, Evolution and Direction of the United States National Environmental Policy Act" (1988) 5 *Environmental and Planning Law Journal* 179-193.

¹¹³ R. Fowler, "Environmental Impact Assessment: What Role for the Commonwealth?-An Overview" (1996) 13 *Environmental and Planning Law Journal* 246-259; J. Kiss, "Exploration and Environmental Issues" (1990) 64 *Law Institute Journal* 398-400; K. Murchison, "Environmental Law in Australia and the United States: A Comparative Overview-Part 1" (1994) 11 *Environmental and Planning Law Journal* 179-192.

¹¹⁴ Blumm, *op cit* 109 p 180.

Unsurprisingly, the *Impact of Proposals Act* has been applied only sparingly since its enactment. In this regard, it is opportune to comment upon the assessment of an oil field located on the continental shelf adjacent to Western Australia.¹¹⁵ As stated elsewhere by the author, the significance of this proposal, the Wandoo Full Field development, is that it represents the first time in relation to Commonwealth waters that a proponent has been required to prepare an environmental review document under the administrative procedures of the *Impact of Proposals Act*.¹¹⁶ Several Commonwealth/state combined assessments have been conducted where proposals overlap state waters elsewhere around Australia. In fact, one of the few previous applications of the *Impact of Proposals Act* to offshore oil activity occurred as a joint assessment during the negotiation phase of the OCS to demonstrate the cooperative governance regime of the P(SL)A.¹¹⁷ However, the Wandoo development is the only environmental impact assessment of an offshore oil proposal located wholly within Commonwealth waters since the *Impact of Proposals Act* was enacted.

The Wandoo proposal was motivated at least in part by the administrative adjustments flowing from the *Gunns* case introduced above.¹¹⁸ The *Gunns* decision widened the application of the *Impact of Proposals Act* to bring within the purview of Commonwealth EIA decisions which previously have been subjected to environmental impact assessment.¹¹⁹ In response to the difficulties presented by *Gunns* the Commonwealth acted to exempt a number of resource decisions from the

¹¹⁵ Commonwealth of Australia Gazette No GN 46, 22 November 1995.

¹¹⁶ N. Evans, "Offshore Oil Updates" (1996) 15 *Australian Mining and Petroleum Law Association Bulletin* 116-117.

¹¹⁷ R. Nunn, "Comment on Environmental Assessment" (1978) 1 *Australian Mining and Petroleum Law Journal* 581-597.

¹¹⁸ See, *Department of Primary Industries and Energy Annual Report 1994-95* (Australian Government Publishing Service, Canberra, 1995).

¹¹⁹ S. Munchenberg, "Amendments to Commonwealth EIA Procedures" (1995) 12 *Environmental and Planning Law Journal* 235-237.

Impact of Proposals Act rather than risk exposing its decision making to greater judicial review.¹²⁰

Scholars have increasingly come to recognize that the discretion built into the *Impact of Proposals Act* has seriously compromised the statute's intention of publicly accountable environmental policy.¹²¹ In terms of its application to outer continental shelf policy, it is apparent that the Commonwealth has administered this legislation so as to minimize any restrictions upon offshore petroleum activity, an observation which further suggests of the Commonwealth's maturity in the area of offshore resources policy.

5.3.3 Law of the Sea Convention in Australia

The Law of the Sea Convention finally entered into force late in 1994, twelve years after the treaty text was concluded. Commonwealth legislation ratifying the Convention was enacted to coincide with its entry into force, making Australia an original States' party. The Commonwealth's action was concerned principally with securing control over offshore resources, however, while delaying action with respect to many of the other treaty provisions. Both these themes are examined at length in the following sections.

5.3.3.1 Entry into force of LOSC and Commonwealth resources policy

The preceding chapters have chartered developments in the Law of the Sea, and the relationship between this body of law and Commonwealth domestic legislation between 1958 and 1982. Following conclusion of UNCLOS III, the

¹²⁰ Commonwealth of Australia Gazette No S 165 25, 5 May 1995. Several minor changes to the Administrative Procedures established under the parent statute have now been instituted. See, Commonwealth of Australia Gazette No GN 25, 28 June 1995.

¹²¹ J. Court, C. Wright and A. Guthrie, "Environmental Assessment and Sustainability: Are We Ready for the Challenge?" (1996) 3 *Australian Journal of Environmental Management* 42-57; R. Fowler, "Environmental Impact Assessment: What Role for the Commonwealth?-An Overview" (1996) 13 *Environmental and Planning Law Journal* 246-259.

treaty was slowly but steadily ratified, with the 60th instrument of ratification being deposited by Guyana in November 1993.¹²² The deposition of this instrument in turn triggered the entry into force of the Convention twelve months later.¹²³ With the exceptions of Iceland and the former Yugoslavia, 58 of the original sixty States ratifying the Convention were developing countries, a situation which prompted one observer of the Law of the Sea to exclaim, "This is an unprecedented state of affairs; the absence of industrialized countries is striking."¹²⁴

That the LOS Convention should be ratified exclusively by non-industrialized countries is not so surprising. As Chapter Four described, developing countries were the main beneficiaries from LOSC, realizing as they did hitherto unknown controls over maritime domains and offshore resources. Notwithstanding the notable omission of western developed countries among the ratifying parties, the Convention nonetheless represented an impressive milestone in multilateral treaty making. Anderson frames the entry into force of LOSC in the following terms –

As the number of parties grows, the Convention will prevail to an increasing extent. This provision signals rather clearly a formal stage in the process of evolution in the law of the sea. The law as it stood in the 1960s is giving way more and more. The process of evolution began many years ago, at least by the 1970s when the 200-mile limit was accepted; but it has accelerated since 1982. Entry into force marks and formalises the change. The Convention of 1982 breaks new ground: new concepts abound. Entry into force of all Parts of the Convention means that States parties can take advantage of possibilities set out in the different Parts and Annexes. Equally, each State Party has to accept claims by other States parties based on the Convention.¹²⁵

Consistent with its traditional support of UNCLOS, the Commonwealth in 1994 passed legislation ratifying LOSC to ensure that Australia was aligned

¹²² C. Conroy, "Agreement on Sea Law Within Reach After 20 Years" (1994) *Insight* 13-14.

¹²³ Convention on the Law of the Sea, Article 308.

¹²⁴ D. Anderson, "LOS Convention: Status and Prospects" (1994) 18 *Marine Policy* 494-497, p 496.

¹²⁵ D. Anderson, "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea" (1995) 44 *International and Comparative Law Quarterly* 313-326, p 320.

with what Vallega termed the new sea use structure.¹²⁶ One commentator describes the Commonwealth's ratification in terms of the history of Australian Law of the Sea policy –

Following the necessary consultations with the States, industry and other interest groups, the Government decided that Australia should ratify the Convention prior to its entry into force on 16 November 1994. Australia will therefore be an original party to the Convention, an appropriate position given our traditional leadership role in the law of the sea negotiations.¹²⁷

Rather than adopting the Convention in entirety, the implementing statute, the *Maritime Legislation Amendment Act* 1994 (Cth), instead incorporated into Commonwealth law those parts of the Convention pertaining to the territorial sea, continental shelf, and exclusive economic zone. The relevant parts of the LOS Convention—Parts II, V and VI respectively—were scheduled in full to the amended *Seas and Submerged Lands Act* 1973 (Cth), replacing references to treaties dealing with the territorial sea and continental shelf signed at UNCLOS I in 1958.¹²⁸ The effect of these amendments was to expand the Commonwealth's control over marine resources, amounting to the articulated of a coherent policy direction.

At the same time that Australia's EEZ came into effect, the continental shelf off north-western Australia and in several other well-chartered offshore areas was extended seaward a considerable distance beyond 200 miles, pursuant to Article 76 of LOSC.¹²⁹ This development was achieved by amending the *Petroleum (Submerged Lands) Act* to redefine the area to

¹²⁶ A. Vallega, *Sea Management - A Theoretical Approach* (Elsevier Applied Science, London, 1992).

¹²⁷ C. Conroy, "The 1982 United Nations Law of the Sea Convention; Entry Into Force and Australian Ratification" (1994) 3 *Australian Environmental Law News* 4-5, p 5.

¹²⁸ N. Evans, "LOS Convention in Australia and Senate Marine Pollution Inquiry" (1996) 13 *Environmental and Planning Law Journal* 3-5.

¹²⁹ Article 76 of the LOS Convention explicates distance and depth criteria upon which coastal States may make delineations of continental shelf areas. These maximum dimensions are 350 miles distant from the baseline or 100 miles from the 2500 metre isobath.

which this statute applied.¹³⁰ As has been discussed at length earlier, the 1958 Convention on the Continental Shelf defined offshore jurisdiction according to a depth and an exploitability criterion, a mix of criteria intended to compensate coastal States with narrow continental shelves. However, some coastal States abused these criteria by pushing legal shelf areas further seaward based upon the exploitability criterion. By acceding to the tighter legal definition of the continental shelf under LOSC, the Commonwealth has put itself beyond reproach in terms of claiming an extended continental shelf.

The Convention does provide for coastal State exploitation of resources beyond 200 miles. In these situations the cost incurred is a royalty payable to the International Seabed Authority in respect of resources exploited outside of the EEZ. As was detailed in Chapter Four, Australia opposed this requirement at UNCLOS and delayed adopting the new definition until the treaty came into force.¹³¹ Although the petroleum potential of the wide continental shelf and deep seabed is unknown, expected earnings from activity in this area will certainly absorb the additional royalty liability.¹³²

The approach to offshore petroleum development has been applied to hard minerals mining as part of the Commonwealth's package approach to LOSC. The recently enacted *Offshore Minerals Act* establishes a mining regime parallel and similar to that which exists under the P(SL)A. Several authors have recognised that the minerals statute adopted the same joint authority structure of the P(SL)A, confirming the success of the joint decision making approach at overcoming offshore jurisdictional limitations.¹³³ The *Offshore Minerals Act* also defines the continental shelf by reference to the

¹³⁰ *Maritime Legislation Amendment Act 1994* (Cth) Schedule 1, amending the *Petroleum (Submerged Lands) Act 1967* (Cth) Schedule 2.

¹³¹ Hildreth, op cit fn 81.

¹³² A. Bergin, "Australia Adopts New Maritime Zones" (1992) 7 *International Journal of Estuarine and Coastal Law* 123-128.

¹³³ N. Evans, op cit fn 4; Rothwell, op cit fn 4.

petroleum legislation, a tactic designed to ensure consistency between regimes in terms of legal definitions and geophysical areas of application.¹³⁴ The *Offshore Minerals Act* therefore applies to the same extended continental shelf area claimed by the Commonwealth for the purposes of petroleum development. Even allowing for the revenue sharing obligations associated with exploitation beyond 200 miles, it has been realized that Australia was one of the "great winners" under the LOS Convention.¹³⁵

5.3.3.2 Limitations with the Commonwealth's implementation of LOSC

The Commonwealth was clearly motivated to secure and enhance its control over the continental shelf, both during UNCLOS III negotiations and twelve years later when the resultant treaty entered into force. In haste to adopt the new provisions, however, a number of key policy areas were either poorly implemented or ignored. Changes to the fisheries regimes exemplify the former. Chapter Four reported how the Commonwealth established the Australian Fishing Zone in 1979 at the behest of its South Pacific neighbours, who were concerned to present a unified regional position at Law of the Sea negotiating sessions. It is only now that the Convention is in force that the Commonwealth has moved to the full EEZ regime. The existing AFZ regime has been retained, however, being redefined under the *Fisheries Management Act* 1991 (Cth) as "the waters adjacent to Australia within the outer limits of the exclusive economic zone".¹³⁶

At least two reasons have been proposed for the Commonwealth's legislative approach towards the offshore resources regimes. Firstly, the history of offshore policy in Australia meant that the OCS could not be threatened by legislative changes, and retaining the AFZ was one means by

¹³⁴ Ibid, Rothwell.

¹³⁵ P. Brazil, "UNCLOS Comes into Force - Implications for Mining" (1995) 14 *Australian Mining and Petroleum Law Association Bulletin* 1-3, p 2.

¹³⁶ *Fisheries Management Act* 1991 (Cth) s 4(1).

which to best preserve existing fisheries arrangement.¹³⁷ It has also been suggested that Commonwealth agencies insisted on keeping the resource regimes separate. Retaining the AFZ ensured that extant legislation would continue to govern fishing and mining activities on the seabed and in the superjacent water space, "an approach which is certain to confuse."¹³⁸

Stronger criticisms of the Commonwealth's LOSC policy apply to its lack of attention to provisions for protecting the marine environment. Prior to the Convention entering into force, Commonwealth jurisdiction over foreign vessels was limited to the enforcement of MARPOL provisions within the territorial sea. The Commonwealth has since legislated to expand its enforcement powers with respect to vessel-source pollution throughout the EEZ, consistent with Article 220 of the Convention.¹³⁹

Part XII of LOSC—Protection and Preservation of the Marine Environment—imposes upon coastal States the obligation to take action in six areas of marine pollution.¹⁴⁰ The more complex aspects of pollution policy—such as atmospheric deposition and land-based sources—were not the subject of legislative action by the Commonwealth. Moreover, legislation giving effect to Article 220 eschewed any connection with LOSC, unlike the *Maritime Legislation Amendment Act* to which were scheduled lengthy parts of the treaty text, quite clearly framed to implement the Convention. The Commonwealth was evidently cautious about incurring the wide environmental obligations flowing from LOSC.¹⁴¹

¹³⁷ A. Bergin and M. Haward, "Australia's Approach to High Seas Fishing" (1995) 10 *The International Journal of Marine and Coastal Law* 349-367.

¹³⁸ Rothwell, op cit fn 4.

¹³⁹ *Transport and Communications Legislation Amendment Act 1994* (Cth)

¹⁴⁰ P. Birnie, "Maritime Policy and Legal Issues" (1994) 18 *Marine Policy* 483-493.

¹⁴¹ Evans, op cit fn 4; Rothwell, op cit fn 4.

In response to the Commonwealth's partial implementation of the LOS Convention, a high-level Parliamentary committee in 1995 resolved to inquire into Australian marine pollution.¹⁴² Although concerned primarily with the discharge by Australia of its obligations arising under Parts XII and XIII of the LOS Convention, the Inquiry's Terms of Reference also reach beyond the Convention and engage with issues of community input, recreational impacts, and biodiversity conservation. The logical response to the inquiry is the imperative to consider a national oceans policy.¹⁴³

The topic of a national oceans policy is pursued further in Chapter Six. For the moment, it is worth highlighting the attempt by the Prime Minister's office to wrest control of marine affairs from line agencies as a first move in this direction, an event reported elsewhere by this author.¹⁴⁴ At the end of 1995, scarcely before the Senate Inquiry had begun its work, the Department of the Prime Minister and Cabinet (PMC) made a concerted effort to assume responsibility for developing a national oceans policy, riding in the wake of the LOS Convention and related Commonwealth legislative activity.¹⁴⁵ At that time, the Science and Engineering Council (PMSEC) within PMC prepared a report for the Prime Minister's consideration, arguing therein that

¹⁴² Evans, *op cit* fn 125.

¹⁴³ Senate Environment, Recreation, Communications and the Arts References Committee "Marine Pollution Inquiry" Hansard, Senate 26 June 1995. The year-long Senate References Committee inquiry is framed by four Terms of Reference: the adequacy of existing Commonwealth, State and Territory legislation to give effect to Australia's obligations under the United Nations Convention on the Law of the Sea, and other international treaties, to address land-based and ship-sourced marine pollution and its effects; administrative arrangements required to better conserve the marine and coastal environment, including consideration of an oceans management policy and its implementation and the scientific research needed to achieve this; impact of pollution on water and sediment quality, marine biodiversity, and commercial and recreational users; and ways of maximizing local community involvement in all aspects of the assessment and management of marine and coastal pollution.

¹⁴⁴ Evans, *op cit* fn 113.

¹⁴⁵ Personal communication, Dr Frances Michaelis, Parliamentary Research Service, 19 April 1996.

options for developing an oceans policy should be seriously pursued by the Commonwealth.¹⁴⁶

It is doubtful that PMC could have fulfilled the coordination role for such a grand initiative, given the tortuous history of offshore resources policy in Australia. Homeshaw also identifies fundamental problems with the PMSEC model which militated against this agency making meaningful progress with developing an oceans policy.¹⁴⁷ In the event, history repeated itself and the Liberal-National Coalition was returned to government in the federal election of March 1996 before the subject could be explored further.

The change of government gave temporary respite to the idea of developing an oceans policy. As the next chapter describes, a year after assuming office the development of an oceans policy was reinvigorated by the Commonwealth. This time, however, it was driven by the Minister for the Environment, a cabinet minister with strong personal interests in marine environmental affairs. As is discussed further in the next chapter, it is precisely because of the ministerial nurturing of the nascent oceans policy that this development is likely to come to eventual fruition.

5.4 CONCLUSION TO CHAPTER FIVE

The most notable feature of the period 1983 to 1995 was the Hawke Government's persistent and confident amendment of the *Petroleum (Submerged Lands) Act* to ensure that the Commonwealth assumed a more dominant role in offshore petroleum policy. This legislative strategy was

¹⁴⁶ Prime Minister's Science and Engineering Council *Australia's Ocean Age: Science and Technology for Managing our Ocean Territory* (Department of the Prime Minister and Cabinet, Canberra, 1995), Recommendation 1.

¹⁴⁷ "The establishment of such agencies often creates conflict because they usurp the coordinating, regulatory and allocative functions previously assigned to members of sectoral subgovernments." J. Homeshaw, "Policy Community, Policy Networks and Science Policy in Australia" (1995) 54 *Australian Journal of Public Administration* 520-532, p 529.

unlikely the product of a grand vision for offshore development, though. Rather, because offshore jurisdiction was so firmly—perhaps irreversibly—settled by the OCS, the Commonwealth was forced to search for creative or innovative means by which to advance its offshore policy priorities. A series of amendments to the P(SL)A enacted by the Hawke Government had the effect of expanding the role of the Commonwealth in offshore policy making. The particular mechanism employed, most effectively, for this purpose was to replace the designated by the joint authority in most areas of decision making.

In her comparative study of the Canadian and Australian offshore petroleum regimes, Hunt keenly observes these amendments to the P(SL)A –

Some informants have suggested that, under the 1967 Agreement's mirror legislation concept, it was difficult to orchestrate amendments between all the parties and, as a result, few amendments were made to the common mining code. These problems have all but disappeared under the 1979 Offshore Constitutional Settlement. The Commonwealth is now clearly in the driver's seat so far as amendments to its PSLA are concerned. While the States are consulted in advance of amendments, only serious political pressure would deviate the Commonwealth from the pursuit of its policy objectives. The erosion of the powers of the DA and the enhancement of the powers of the Joint Authority (JA) since 1983 amply demonstrate the Commonwealth's attitude that its policies should prevail in the adjacent areas.¹⁴⁸

As well as amending the jurisdictional arrangements under the P(SL)A, the Commonwealth became visibly more active in its interactions with industry. In spite of strong protest from industry operators, the Hawke Government persisted in enacting rather radical changes to the revenue regimes and a miscellany of other conditions applying to offshore development on the continental shelf. A comment made by Norm Sanders, leader of the Australian Democrats [the party holding the balance of power in the Senate]

¹⁴⁸ Hunt, *op cit* fn 3 pp 107-108.

during debate on cash bidding encapsulates the outcome of these amendments –

We have to start now getting away from the attitude that merely to drill for more oil will solve our problems ... This Bill is a step in the direction of putting the oil industry on notice that it will not get exactly what it wants. It will get an adequate profit out of this, it will get a good enough deal, but it will not get exactly what it wants.¹⁴⁹

The lengthy rule of the Hawke-Keating Government [twelve years] provided the offshore petroleum regime with a unique opportunity to mature, uninterrupted by inter-governmental disputes which had hitherto characterized the whole offshore saga. It is crucial to recognize that the continental shelf, the area to which the P(SL)A applies and where the vast reserves of offshore oil are found, is a Commonwealth place. The amended regime reflects the logic and necessity of joint decision-making in relation to this expansive offshore area, while reserving to the Commonwealth a right to veto designated authority decisions, or prevail in the event of disagreement between the Commonwealth and states. When reminded of the constitutional basis of the continental shelf, the reform of the P(SL)A during this fourth evolutionary period is considered as best evidencing the Commonwealth's maturity in developing and administering policy through legislation.

Chapter Six of the thesis now updates to 1998 the P(SL)A under the Howard Coalition Government. Most of the tension and extreme redefining of offshore jurisdiction under the petroleum legislation has now obviated. The few years of post-Hawke Government have seen the extant regime largely consolidated. Several major policy initiatives have been commenced by the Commonwealth under the new government, and these are also introduced.

¹⁴⁹ *Hansard*, Senate, p 1332.

Chapter Six

Current Developments in Offshore Petroleum Policy – 1996-1998

The extended Hawke-Keating Labor Government provided a continuity and stability in offshore resources policy that had until the 1980s been missing in Australia. Over this period the Commonwealth was able to significantly advance its marine resources priorities without reopening basic jurisdictional questions. Labor's thirteen year reign ended in March 1996 when the Liberal Coalition Government was returned to power. In the two years since that time the P(SL)A regime has been maintained largely unaltered, having reached a condition of maturity in terms of satisfactorily aligning Commonwealth and state offshore responsibilities and interests. There is however, a high level of Commonwealth/industry interaction. The strength of the relationship between the new government and the petroleum sector has provided the latter with the opportunity to have revisited some of the policies introduced by Labor which it opposed. Foremost amongst these is the resource rent tax.¹

A number of technical matters relating to the determination of offshore zones are also being addressed by the Commonwealth. The inner and outer margins of Australia's oceanic jurisdiction are being resurveyed to support additional claims over offshore areas under the Law of the Sea Convention. Both the baseline from which the territorial sea is drawn and the extended limits of the continental shelf may be drawn more generously now that Australia has ratified LOSC. Under provisions of this treaty, coastal States can claim continental shelves that exceed in width 200 miles, provided that these

¹ "Deep water producers seek resolution on tax changes" *The Australian* 10 March 1998; "Canberra reviews tax on gas fields" *The Age* 10 March 1998.

extended zones are mapped and delineated. The Commonwealth is therefore able to realize a much enlarged continental shelf, with implications for the development of offshore seabed resources.

Another new initiative receiving a high profile is the oceans policy. The concept of an oceans policy has been the subject of occasional—if not tentative—expressions of interest from academia and government, but without ever being converted into a statement of intention approximating a coherent policy.² The Howard Liberal Government is committed to developing an oceans policy to coincide with 1998, the United Nations International Year of the Oceans.³ Perhaps most importantly, the policy defers heavily to extant resource regimes. Legislation governing marine resources activity will be continued without reform under the final oceans policy, in recognition of the utility of the legislative models in place.

The development and status of the oceans policy as the vision of this government is outlined in the first part of this chapter. Part 2 then reviews the offshore petroleum policy initiatives of the Howard Government, while some of the specific matters relating to Australian offshore boundaries are introduced in the final part.

6.1 THE COMMONWEALTH OCEANS POLICY

6.1.1 Developing the Oceans Policy

The previous discussions about the Offshore Constitutional Settlement have shown how the various arrangements agreed thereunder between the two

² A. Bergin, "Australian Ocean Policy - the Need for Review" (1986) 10 *Marine Policy* 155-157; W. Ederson, *Australia and the Implementation of the Law of the Sea Convention* (ANU Law School, Canberra, 1987); *Review of Marine Research Organisation* (AGPS, Canberra, 1993).

³ *Australia's Oceans - Oceans Policy Consultation Paper* (Department of the Environment, Canberra, 1997).

spheres of government were conceived as an integrated package. The OCS was never intended to amount to an articulated oceans policy, however, even though most sectors of interest were included within its ambit. Seventeen more years were to pass before the notion of an oceans policy appeared on the governmental agenda.

A certain momentum had to be generated before the Commonwealth would seriously contemplate embarking upon the path that might lead to an eventual policy. The main driver in this respect was a panoply of reviews concerning marine matters conducted during the early 1990s, some of which were canvassed in Chapter Five. Several influential reports addressing marine science and engineering also appeared around this time.⁴ Davis identifies the important and timely confluence of these domestic events with those of an international scope, particularly the United Nations Conference on Environment and Development and the LOS Convention. He observes that twin foreign and domestic imperatives influenced the Commonwealth's eventual commitment to pursue a national oceans policy –

In a very real sense there is no 'Australian' oceans policy as yet, but rather a multiplicity of narrow sectoral concerns reflecting the diverse priorities of each state and the Commonwealth. Numerous commentators have drawn attention to the fragmentation of oceans governance in Australia, but little remedial action has been taken ... In the case of Australian oceans policy it is less a question of whether duplication is occurring, but more a question of whether there is any holistic perspective at all. Thus far, Australia appears to have failed this test and now finds itself under pressure, given many international and domestic obligations to consider.⁵

Clearly, the accumulation of expectations—both national and international—lent considerable insistence to the need for the

⁴ See, *Oceans of Wealth* (Australian Government Publishing Service, Canberra, 1989); *Review of Marine Research Organisation* (Australian Government Publishing Service, Canberra, 1993).

⁵ B. Davis, "National Responses to UNCED Outcomes: Australia", in L. Kriwoken, M. Haward, D. VanderZwaag and B. Davis (ed), *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International, London, 1996) pp 25-40, p 26.

Commonwealth to prepare at least a policy basis underpinning all offshore sectors. The presence of external factors—however influential—would not necessarily persuade the Commonwealth to develop this missing basis, however. Like other scholars, Haward recognizes the influence of such policy initiatives as the IGAE and ESD working groups on moves towards developing an oceans policy.⁶ Importantly, though, he locates this trend within the context of evolving offshore intergovernmental relations and the improved vertical harmonization of marine resources policy. At the very least, Commonwealth agencies—and to a lesser extent research bodies—are communicating more openly across sectoral interests, and it is this exchange which greatly facilitated the ambitious oceans policy.

The formal imprimatur to develop a national oceans policy came from the new Prime Minister, John Howard, one year after assuming office. In his speech to Parliament announcing the initiative, the Prime Minister explicitly referred to the philosophy underpinning the oceans policy –

I am delighted to fulfil another election promise today by announcing the development of the coalition government's policy on Australia's oceans. This is a policy which will balance the needs of the environment with the needs of resource security and jobs. We will work with state and local governments and communities to put together a comprehensive strategy ... We will put in place a balanced and integrated oceans policy ranging across all jurisdictions. This will provide certainty for both industry and the marine environment. The government believes one can reconcile the environment and development.⁷

Perhaps surprisingly, relatively few difficulties were encountered in defining the content of the oceans policy. Matters pertaining to administrative arrangements assumed almost insurmountable dimensions, however [more in the next section]. The attempt by the Department of Prime Minister and Cabinet to adopt lead agency role on marine affairs [described earlier in

⁶ M. Haward, "Institutional Framework for Australian Ocean and Coastal Management" (1996) 33 *Ocean and Coastal Management* 19-39.

⁷ *Hansard*, House of Representatives, 3 March 1997, p 1698.

Chapter Five] disappeared with the election of the Howard government. More creditable contenders for this coordinating role were the Departments of Industry, Science and Tourism, Primary Industries and Energy, and Attorney-General's. In the event, the task of preparing the oceans policy was given to the Environment Minister, Robert Hill. The enormity of his directive did not go unnoticed at the time of the Government's announcement –

The Howard Government, confronted with the Herculean task of appeasing state interests, international interests, and commercial interests, has placed responsibility for the policy with the Minister for the Environment, Senator Robert Hill ...ministers are shy on divulging details about the policy's progress ... Certainly the issues underpinning a national ocean policy are politically volatile and the stakes are high for affected industries.⁸

Charging the Environment Minister with oceans policy responsibility was almost inevitable as his portfolio was the one with true cross-sectoral perspectives. However, the directive to satisfy the multiplicity of offshore interests within the current legislative framework was in fact the greatest constraint to developing the oceans policy. Because each sector was determined to preserve its sphere of offshore activity there was little to really negotiate in terms of policy development.

6.1.2 The Process and Substance of the Oceans Policy

Following Prime Minister Howard's announcement of the oceans policy, an iterative process of drafting and consultation was undertaken leading to the release of a draft policy in May 1998. There were several parallel threads to the process. Firstly, an initial consultation paper released in March 1997 stimulated a considerable volume of public submissions, which were collated and analyzed to help refine the policy over the year. A series of Issues and Background Papers were commissioned by the Department of the

⁸ "Ocean awaits policy wake-up call" *The Canberra Times*, 18 January 1997.

Environment to elicit feedback in relation to specified topics, such as biological diversity and international legal instruments.⁹ Workshops involving key stakeholders were also held around the country throughout the year, culminating with a public forum at Parliament House in December. The Environment Minister also established a Ministerial Advisory Group on Oceans Policy (MAGOP) to provide stakeholder feedback directly to his office, complementary to departmental efforts. Finally, portfolio marine agencies contributed to developing the policy through their own internal processes.

Following the year-long policy development process, in May 1998 the Commonwealth released the draft oceans policy for a final round of public consideration.¹⁰ Every sector of marine activity was contemplated by the draft oceans policy. For the most part, the policy identified a number of issues associated with each sector and committed the Commonwealth to a course of action or a number of responses in respect of those sectoral issues. The responses were expressed in non-committal, hortatory terms, though, effectively ensuring that the basis of offshore regimes would not be revisited. Indeed, it was the strength of existing regimes that ensured the oceans policy would "retain and build on strengths in existing sectoral and resource management arrangements."¹¹

The oceans policy was intended to therefore serve as a framework for better aligning activity across existing sectors. Within this developmental framework, the *Petroleum (Submerged Lands) Act* was referred to as a "leading example of joint Commonwealth-State natural resource management."¹² In terms of future directions the draft oceans policy proposed to –

⁹ A list of the Oceans Policy Background and Issues Papers is provided in Appendix Three.

¹⁰ *Australia's Oceans Policy—An Issues Paper* (Department of the Environment, Canberra 1998).

¹¹ *Ibid*, p 10.

¹² *Ibid*, p 16. A copy of the full oceans policy description of the P(SL)A is reproduced in Appendix Three.

Build on existing petroleum and minerals management regimes to incorporate ecosystem and cross-sectoral considerations in an integrated approach to marine resource use and access decision-making that is consistent with the principles of ecologically sustainable development and multiple and sequential use.¹³

Quite clearly, the foundation of offshore policy, the Offshore Constitutional Settlement, was to be continued intact by the oceans policy, as had occurred several years earlier with the entry into force of the LOS Convention. This position with respect to the OCS was originally settled in the cabinet decision endorsing development of the oceans policy.¹⁴ Notwithstanding cabinet's imprimatur of the OCS, it was recognised that "some changes to the OCS administrative arrangements may need to be considered".¹⁵

As commented, the substantive framework of the oceans policy was settled fairly easily, the result of the exhaustive consultative process combined with the fact that no major readjustments of legislation were proposed. The greatest stresses on the oceans policy arose at its latter stages, when it became necessary to canvass institutional changes to give effect to the formative policy. A principal vehicle through which these options were being considered was MAGOP, which in early 1998 produced a report wherein it examined the question of new institutional arrangement models. The MAGOP report noted that –

Unanimity was not reached on this issue. One view was that current institutional, planning and management arrangements are flexible enough to enable increased communication, coordination and consultation through these arrangements. A second view was that the current arrangements are fragmented and lack a strategic focus and integrated approach to the conservation of the ocean's biological diversity. New arrangements are needed to give a more strategic planning focus and to provide greater integration of use and planning.¹⁶

¹³ Ibid, p 48.

¹⁴ *Oceans Policy: Cabinet Position*, (Cabinet-in-Confidence submission # JH96/0507, undated).

¹⁵ Ibid.

¹⁶ Report of the Ministerial Advisory Group on Oceans Policy-Australia's *Oceans Policy* (Department of the Environment, Canberra, 1998).

As of August 1998, the subject of institutional arrangements had not been settled. A Senior Officials Working Group on Institutional Arrangements was formed with the explicit purpose of progressing discussions on the matter.¹⁷ It seems that the most likely model to emerge from ongoing negotiations over institutional arrangements is an intergovernmental oceans coordination forum located within the Department of the Environment, charged with coordinating marine policy between portfolio sectors but without intervention capacities. There are tensions over this reduced model, however, which have lead to the prospect of the states withdrawing from the oceans policy with the resultant product being a Commonwealth rather than a national policy.¹⁸

6.2 THE HOWARD GOVERNMENT AND OFFSHORE PETROLEUM

6.2.1 The role of the Commonwealth Minister

With the incoming of a new Commonwealth government it was to be expected that a new compact of intergovernmental and industrial relations would be entered into. Perhaps the notable aspect of the brief office of the Howard Government, however, is the effective continuation of the offshore petroleum legislation and policies commenced under Hawke. In fact, where different emphases in policy as between the Howard and Hawke Governments can be observed these are attributable to the continued maturation of the regime rather than to philosophical differences in politics. Put another way, despite the posturings of the new government there were few policy dimensions to distinguish the Commonwealth's approach to offshore petroleum under the two governments. The policy position that had

¹⁷ *Oceans Policy Status Report # 10* (Department of the Environment internal correspondence, 11 August 1998).

¹⁸ Standing Committee on Fisheries and Aquaculture, Meeting # 38 (4-5 August 1998, Hobart); Agenda No. B6 "Oceans Policy".

increasingly emerged since the early 1980s was maintained and refined under the Howard Government.

The factor which most facilitated further refinement of the P(SL)A was the very personal interest in mineral resources of the Minister for Resources and Energy, Warwick Parer, and his close relationship with Prime Minister Howard. The confluence of these two factors was commented upon recently in the print media –

... it was in the 1960s, with the Bass Strait oil discovery and development, that Parer was propelled into the industry ... So with Howard's long-standing friendship it was no surprise that, despite an innocuous parliamentary career in Opposition, Parer was rewarded with a ministry. His expertise in the mining industry was lauded as the perfect grounding for the resources and energy portfolio.¹⁹

In general terms, the Commonwealth is seen to have moved to better service the needs of the resource industries under the Howard Government. For example, the 1998 release of offshore acreage was noted as the largest ever conducted in Australia, being offered "in response to industry interest".²⁰ The release was also made under the work program bidding system rather than the much-resented cash bidding system introduced through legislation of the Hawke Government in 1987.

Despite these micro-level policy decisions under the P(SL)A, there were no changes to the legislation. As argued by this thesis, the legislative regime has matured to the extent that the Commonwealth has now aligned its interests relative to state governments and industry. The most important contribution to offshore petroleum policy made by the new government was to release a Commonwealth resources policy providing a framework for administering the P(SL)A.

¹⁹ "A lifetime link with the mining industry" *The Australian*, 13 March 1998. Also, Address to Australian Coal Operations Conference, Wollongong, 18 February 1998.

²⁰ Address by the Minister for Resources and Energy to the 1998 APPEA Conference *Delivering National Prosperity*, Canberra, 9 March 1998.

6.2.2 Minerals and Petroleum Resources Policy Statement

The Commonwealth's first ever resources policy was released in early 1998. Minister Parer expressed his Government's sentiment towards meeting the needs of industry when launching the policy statement –

... Australia needs a clear and comprehensive strategy to ensure that our minerals and petroleum industries can use their strengths, energy and ingenuity to sustain and enhance their competitiveness. They will need to set world standards of performance, while meeting community expectations, in all aspects of their operations. To help these industries realize sustained and confident competitiveness, the Government has accepted that all Commonwealth decisions affecting the resources sector should be taken within a clear and cohesive framework of objectives and principles which recognizes its circumstances, importance and potential.²¹

The resources policy is structured around five key elements: providing certainty to investors in terms of their rights and responsibilities; creating a competitive economic operating environment; supporting industry efforts to sustain wealth generation through value-adding; protecting the environment, workforce and broader community interests; and allowing industry to respond to international pressures and opportunities.²² Under the umbrella of the resources policy several subject areas were highlighted by either the Government or industry for revision.

Firstly, the Government has undertaken to amend the P(SL)A to clarify several areas of decision-making, as experience with the offshore regime has revealed some new or lingering problems. In launching the resources policy, Minister Parer stated that –

The Commonwealth, State and Territory Governments are presently considering a package of amendments to the Petroleum (Submerged Lands) Act. This package seeks to improve legislative processes, streamline administration and remove unnecessary or outdated

²¹ Address by the Minister for Resources and Energy at the Launch of the Commonwealth Government's Minerals and Petroleum Resources Policy Statement, Canberra, 2 February 1998.

²² *Minerals and Petroleum Resources Policy Statement* (Department of Primary Industries and Energy, Canberra, 1998), "Principles for Government Action".

requirements. One proposed amendment will change the term of Production and Pipeline Licences to facilitate long life projects such as LNG developments. Another proposal will provide developers with secure tenure over petroleum facilities located outside of a Production Licence area. A further proposal will seek to increase the turnover of acreage to encourage new exploration. The proposed amendments have been extensively discussed with industry, through APPEA, and there is substantial agreement on them. Industry involvement in this exercise has been most constructive and appreciated by all levels of Government.²³

A second subject area addressed by the resources statement is that of environmental approvals for petroleum development. The policy commits the Commonwealth to "streamlining its regulatory framework for environmental management" in all resources sectors.²⁴ With respect to offshore petroleum, this revised approach is to be achieved by promulgating objective-based regulations under the P(SL)A requiring operators to prepare environment plans wherein performance standards and criteria will be justified.²⁵ The new regulations are to be promulgated later in 1998.

Regulations will succeed in meeting the Government's commitment of providing celerity to the offshore industry in terms of environmental protection requirements. The cost, however, is a further erosion of public accountability which would otherwise be available through formal environmental impact assessment. As was described in the previous chapter, offshore development has with one exception avoided external environmental review.²⁶ This lack of oversight will be perpetuated through the modified regime proposed by the Government. Insofar as the argument advanced in this thesis is concerned, internalizing environmental review

²³ Address by the Minister for Resources and Energy, op cit fn 21; 5(b) Review of Offshore Petroleum Legislation.

²⁴ *Resources Policy Statement*, op cit fn 22; Part Two "The Way Ahead".

²⁵ Address by the Minister for Resources and Energy, op cit fn 21; 5(f) Environment.

²⁶ In addition to the lack of external oversight, resources legislation is very poorly constructed to adequately address environmental issues. See, A. Bradbrook, "Energy Law: The Neglected Aspect of Environmental Law" (1993) 19 *Melbourne University Law Review* 1-19.

under the P(SL)A further demonstrates the Commonwealth's policy making capacities.

The most contentious area of offshore petroleum decision-making being revisited by the resources policy statement is the resource rent tax. As discussed in Chapter Five, the RRT was introduced by the Hawke Government in 1987 to apply to greenfields projects, much to the chagrin of the offshore industry. Ten years later in the mid-1990s, the Australian Petroleum Production and Exploration Association in particular relied upon the sympathies of a receptive minister to broach the topic of repeal or amendment of the RRT legislation. Immediately following the election of the Howard Government, APPEA raised on the public agenda the issue of the RRT, suggesting that the petroleum industry could double in fifteen years if secondary taxes were abolished on deepwater oil developments and new LNG projects. APPEA chief executive [Dick Wells] cautioned "that Australia could lose the chance to develop new petroleum projects worth \$60 billion if there were no change to the way they were taxed."²⁷

At that time, Minister Parer refused to give any assurance that the Commonwealth would remove the RRT, nor that it "considered such a move necessary."²⁸ Notwithstanding Parer's intimate association with the minerals resources sector, the Government's position as articulated in the 1998 resources policy statement remained non-committal towards abolishing the RRT. To break the impasse between the Commonwealth and industry over the RRT, the Government in March appointed an international oil expert from the University of Aberdeen to compare the Australian fiscal regime applied to offshore activity with other regimes around the world.²⁹

²⁷ "Tax cut 'to double petroleum output'" *The West Australian*, 18 June 1996.

²⁸ *Ibid.*

²⁹ "Resource tax review" *Herald Sun*, 10 March 1998; "Deep water producers seek resolution on tax changes" *The Australian*, 10 March 1998.

Some commentaries were hopeful that the appointment of an expert reviewer heralded a shift in Commonwealth policy towards the RRT. One newspaper suggested that the "Federal Government is edging closer to granting tax breaks for the development of remote oil and gas projects in water depths of more than 400 metres."³⁰ The oil industry was considerably more stoic in its response to the RRT review, having campaigned for more than two years—under an ostensibly sympathetic government—to have the RRT replaced. The nation's leading finance newspaper reported debate on RRT reform in the following terms –

APPEA's next tax reform proposal revolves around gaining tax relief for risky deep-water exploration beyond the margins of Australia's continental shelf. Mr Heath [APPEA chair] said detailed discussions with the Federal Government were under way but no immediate resolution of the deep-water issue was likely.³¹

From the public record, it appears that industry's expectations of a compliant government decision on the future of the RRT have been dashed. This being the case, the Government's resolve to inform the offshore industry—through policy decisions—that the Commonwealth was now setting the agenda for petroleum policy is again apparent. Aside from some shifts between parties as to minor operational matters, the parameters for offshore development in the Commonwealth sphere are now firmly established.

In relation to the argument advanced in this thesis, the Commonwealth is seen to be strengthening its position through political and legislative means rather than by jurisdictional disputes, as shown in the evolution and maturity of the P(SL)A. It is also important to discuss recent evolutions in the offshore relationship between the Commonwealth and Western Australia. As occurred during the early 1980s, Liberal Coalition governments are now in

³⁰ "Canberra reviews tax of gas fields" *The Age*, 10 March 1998.

³¹ "Oil and gas industry rides high" *Financial Review*, 9 March 1998.

power federally and the state of Western Australia. Despite the convenience for offshore policy making of this situation, dissent between the two governments is now beginning to foment over the distribution of offshore costs and benefits, an issue discussed elsewhere by this author.³² The state government is increasingly burdened by the necessity of supplying onshore infrastructure to support offshore development located in Commonwealth waters, a contribution for which it receives little recompense. As offshore operators move further offshore to exploit petroleum reserves, and the state receives correspondingly less direct revenue through royalties, this situation is likely to deteriorate further.

After nine months of negotiating with the new Commonwealth Government over the fiscal elements of the petroleum regime, the Western Australian Minister for Resources [Colin Barnett] expressed his dissatisfaction with having to support Commonwealth offshore activity in this manner.

... you have both Commonwealth and State jurisdiction and also a sequence of ad valorem royalties in the State areas and resources rent taxes in the Commonwealth areas. It seems to me that having ... a mix of different fiscal regimes is not productive for the industry in the long term. Unless we tackle that issue and get it right you will start to get investment decisions which are biased according to where the fiscal regime is. The Commonwealth (through company tax) is the major winner out of the oil and gas industry. But the State also has responsibility for infrastructure, both economic and social, such as schools and hospitals plus ... the administrative responsibility over safety and environmental law. I'm asking them to come to a sensible sharing arrangement which will allow everyone to win.³³

The interesting message to come from this obvious expression of discontent on Western Australia's part is that there are possibly very real limits to the utility of the joint authority arrangement. Whilst the state obviously benefits

³² N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204.

³³ "Minister warns of royalty threat to oil, gas billions" *The Weekend Australian*, 21-22 December 1996.

from being able to participate in continental shelf decision-making, and does appreciate a royalty gain in fixed proportion to the value of wellhead oil, being excluded from reaping a greater dividend perhaps seriously constrains the regime [notwithstanding, of course, that continental shelf resources accrue exclusively to the Commonwealth].

Less certain, however, is the scope of this perceived inequity. Barnett's view suggests that Western Australia is seeking compensation for providing essential shore-based services to the Commonwealth, which currently go unaccounted in policy making. A more expansive interpretation is that the steady state of jurisdictional maturity attained by the regime now permits the state to challenge other dimensions, such as revenue arrangements. Chapter Five recounted how Victoria sought to realize a greater share of offshore revenue by directing the rate of production to be increased, at the inopportune moment when the Hawke Government was contemplating wholesale reform of offshore arrangements. Western Australia has possibly been more patient in this respect, having consolidated its position in offshore policy and administration before attending to fiscal aspects.

A final observation from the present offshore arrangements would seem to support such an interpretation. In addition to the frustrations expressed over revenue-sharing, Western Australia is also decrying the lack of any obligatory local content requirements for operations in Commonwealth waters.³⁴ Projects operating in Western Australian coastal waters are required under State Agreement Acts to source a certain portion of goods, labour, materials and services from local suppliers. Minister Barnett has noted that no similar requirements apply in respect of continental shelf activities, "one of the least attractive outcomes of the present system."³⁵ Western Australia's

³⁴ "Local content proposal buoys oil and gas industry hopes" *The Australian*, 18 August 1998.

³⁵ "Minister warns of royalty threat to oil, gas billions" *The Weekend Australian*, 21-22 December 1996.

long history with onshore resource development, its experience with providing shore-based facilities for offshore activities in both state and Commonwealth waters, and its administrative load as the designated authority, has undoubtedly enhanced the state's understanding of the technical demands of offshore development. When put in this perspective, it is unsurprising that Western Australia feels it is not being adequately compensated for its role in offshore policy making.

6.3 EXTENDING AUSTRALIA'S OFFSHORE BOUNDARIES

6.3.1 Redrawing territorial sea boundaries

In parallel with policy initiatives in relation to offshore petroleum, efforts are underway to redraw territorial sea baselines and expand the area of sea under Australian jurisdiction. Chapter Four described how baselines were proclaimed early in 1983 delineating the territorial sea, thereby bringing the OCS into effect. It was noted that these baselines were drawn very conservatively compared with those permissible under the newly concluded Law of the Sea Convention. In 1998, the Commonwealth embarked upon an exercise to draw the territorial sea baseline further seaward relying upon the relevant provision of LOSC pertaining to straight baselines.³⁶ Rothwell describes the importance of this move in the following terms –

In 1983 Australia declared straight baselines around certain areas of the coast by reference to lowest astronomical tide ... While these baselines were considered suitable at the time, following the extension of Australia's territorial sea, and the Australian ratification of UNCLOS, there now exists the potential for the baselines to be reviewed ... If Australia redrew its baselines in conformity with UNCLOS there would be a number of consequences. First, new areas of internal waters would be created, thereby extending Australian sovereignty. Second, the new baselines would become the basis for all Australia's maritime claims with the result that these claims would be asserted further offshore. Third, the enclosure of certain waters within baselines would give Australia enhanced capacity to protect particularly sensitive marine

³⁶ Law of the Sea Convention, Article 7.

environments, such as those found in the Great Barrier Reef and Torres Strait.³⁷

The Commonwealth's enthusiasm in expanding the offshore areas under its jurisdiction has been criticised by at least one commentator.³⁸ The particular criticism relates to the poor technical basis of the territorial sea baselines drawn around some of Australia's external territories. Notwithstanding criticisms about the technical content of these claims, the legislative framework is already being updated to absorb changes to resource titles that will be necessary as a result of baselines being redrawn, guaranteeing the validity of valuable offshore titles.

The particular means by which this security is to be achieved is through amendment to the *Petroleum (Submerged Lands) Act*. The P(SL)A was amended in 1997 to enable pipeline licences granted thereunder to be continued intact regardless of the effect of changes to the boundary of the particular adjacent area of new baselines.³⁹ That the Commonwealth should legislate in this manner—before new baselines are even drawn—reveals clearly its intention to maximize claims over offshore areas. Minister Parer's second reading speech for the legislation conveys this intention, and contextualizes future offshore claims within the OCS –

The amendments to the Petroleum (Submerged Lands) Act will ensure that petroleum pipelines on the Australian continental shelf that carry petroleum from a source outside Australian waters come within the scope of the Petroleum (Submerged Lands) Act 1967 ... The amendments will also ensure that changes to the territorial sea baselines do not impact on any offshore petroleum pipelines granted under Commonwealth jurisdiction. This will give certainty to holders of offshore pipeline licences if changes to baselines occur. Similar amendments relating to petroleum exploration permits, production licences and retention leases will be introduced after necessary

³⁷ D. Rothwell, "The Legal Framework for Ocean and Coastal Management in Australia" (1996) 33 *Ocean and Coastal Management* 41-61, p 45.

³⁸ V. Prescott, "Australia's Proclamation of an Exclusive Economic Zone (EEZ)" (1995) 10 *International Journal of Marine and Coastal Law* 95-105.

³⁹ *Primary Industries and Energy Legislation Amendment Act (No. 2) 1997* (Cth).

consultation with the states and the Northern Territory is concluded. Under the provisions of the offshore constitutional settlement, states and the Northern Territory are expected to mirror these amendments in their offshore petroleum legislation.⁴⁰

6.3.2 Claims over the extended continental shelf

Complementing efforts to redraw the inner boundaries of Australian jurisdiction the Commonwealth is also engaged in redefining the seaward extent of the continental shelf. The ambulatory effect of the 1958 definition of the continental shelf has been treated at length earlier, so this wont be restated again here. Suffice it to restate that the absolute maximum rule for outer continental shelf boundaries provided by the LOS Convention are 350 miles from the territorial sea baseline or not distant than 100 miles of the 2500 metre isobath. Article 76 of LOSC permits coastal States to use whichever criterion is most suitable to particular continental shelf areas.

Chapter Five described the Commonwealth's accession to the definition of the continental shelf contained in the 1982 treaty, to ensure that its offshore policy is current with international practice. Having adopted the more expansive definition, it is now incumbent upon the Commonwealth to chart the continental shelf and deposit the necessary technical information with the Commission on the Limits on the Continental Shelf—established by LOSC—for verification.⁴¹

Following the election of the Howard Government and the resultant budgetary restraints, grave concerns arose as to the ability of the Commonwealth to discharge its continental shelf obligations under the Convention. Substantial reductions in the budget of the Australian Geological Survey Organisation (AGSO)—the Commonwealth's primary

⁴⁰ *Hansard*, Senate, 16 June 1997, p 4227.

⁴¹ Law of the Sea Convention, Article 76(8).

repository of geological information—threatened to curtail if not completely halt the offshore mapping program –

The cuts include the likely beaching of the national marine geological survey vessel, the *Rig Seismic*, which has played a key role in the search for offshore oil and gas. Researches say this will seriously impair efforts to define Australia's new marine boundaries along the edge of the continental shelf beyond the 200 mile zone. That would leave unsettled the issue of exactly what ocean territory belongs to Australia under the United Nations Convention on the Law of the Sea—and what mineral and biological resources it contains.⁴²

Two years later, possibly out of recognition of the enormity of mapping the continental shelf, the Commonwealth endowed AGSO with increased funding expressly to expedite offshore mapping.⁴³ The 1998-99 annual appropriations allocated AGSO extra funding to analyse geophysical data collected at sea, in addition to the \$17 million received in the previous budget to ensure that the survey vessel was able to continue offshore mapping. In allocating AGSO this additional budgetary funding, the personal interest of the minister again appears to be important.

Parer at the time referred to the speculative nature of oil reserves located on the claimable continental shelf beyond 200 miles, noting that "It is imperative that we can mount a successful claim for this vast area of ocean floor."⁴⁴ The technical and legislative changes introduced here will ensure that both the baseline and continental margin will be the maximum claimable under the LOS Convention, securing Australian control over expanded offshore areas.

⁴²"Scientists, miners warn on survey cuts" *The Australian*, 3 June 1996.

⁴³ "Oil search boost" *The Australian*, 13 May 1998.

⁴⁴ "Oil search boost" *The Australian*, 13 May 1998.

6.4 CONCLUSION TO CHAPTER SIX

The period 1996-1998 coincides with the brief rule of the Howard Coalition Government. Probably the outstanding feature of this two year period is the seamless continuation of the administrative arrangements settled through legislation of the previous Labor Government. Because the statutory partnership between the Commonwealth and states has finally attained a climax steady state the government for the first time has not needed to attend to intergovernmental matters, and could instead afford the luxury of contemplating the revenue aspects of the offshore regime.

The offshore industry was clearly expectant of special redress in terms of the resource rent tax, relying upon its close affiliation with the Minister for Resources and Energy. However, whilst Minister Parer did respond to some of the demands of his constituents, his presence as the harbinger of potential reforms to the revenue system generally went unrealized. The Howard Government, although attentive to the demands of the resources sector, nonetheless maintained and affirmed the role of the Commonwealth relative to state governments and the offshore industry established previously. Given the mature condition of the offshore petroleum regime, little scope therefore exists for major change to the nature of offshore policy and administration.

The Commonwealth is unlikely to revisit the highly effective jurisdictional provisions of the P(SL)A. Future governments may nonetheless endeavour to refine the technical detail of decisions made under the legislation, or change the policy framework within which the P(SL)A is administered. In this respect, the Howard Government has initiated two ambitious policy proposals, the development of an oceans policy and release of the Minerals and Petroleum Resources Policy Statement.

The important observation from these policies is that the sectoral resources regimes will continue in spite of any new coordinating oceans body which may be created. Moreover, the resources policy statement has been kept carefully distant from the oceans policy—there is no articulation between the two—ensuring that decisions over offshore petroleum can continue unburdened by considerations extraneous to the exploitation of resources. If there is to be future stress upon the regime, this will possibly come from discontent by Western Australia over the Commonwealth's failure to share the pronounced benefits of RRT currently being collected from the development of new oil on the extended north west shelf. The sequence of recent events reinforces the argument advanced in this thesis, that the P(SL)A regime has evolved over a thirty year period to its current mature condition as the principal instrument by which the Commonwealth is able to advance its continental shelf resource policies.

Chapter Seven

The Commonwealth and Offshore Petroleum Policy – Some Conclusions

This study has documented the history of the *Petroleum (Submerged Lands) Act* 1967 (Cth), with emphasis on the evolving relationship between the Commonwealth and states. In particular, the research has explored both the characteristics of the legislative regime which make it a successful model, and the forces shaping the reform of this legislation over time. A number of academic works have reviewed the P(SL)A from a strictly legal perspective, and described the substantive elements of the legislation at major reformist junctures.¹ None of these works have attempted to explain why the Commonwealth originally vacated the policy field to the states in 1967, nor interpret the factors that motivated subsequent federal governments to redress this situation through legislation.

To assist in analyzing reform of the P(SL)A, Chapter One introduced a framework comprising two sets of parameters, legal and contextual. The first tier of this framework consists of the two legal authorities enabling the enactment of offshore legislation, the Australian Constitution and the Law of the Sea Convention. Within this framework a number of contextual factors were also introduced to help in understanding the content of particular legislative proposals developed over time. Included in this second set of parameters are five factors: the extent of Australia's maritime domains; industry pressures and Commonwealth relations; uncertainties over offshore

¹ M. Crommelin, "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 *Australian Mining and Petroleum Law Journal* 191-213; R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" (1988) 6 *Journal of Energy and Natural Resources Law* 213-247; R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (The Federation Press, Sydney, 1990); R. Lumb, "Sovereignty and Jurisdiction Over Australian Coastal Waters" (1969) 43 *The Australian Law Journal* 421-438.

jurisdiction; federalism and intergovernmental relations; and the Commonwealth's offshore capacities. By exploring the interaction of these different parameters the evolution of the P(SL)A is able to be more fully understood.

The P(SL)A regime is shown to have evolved through two rather distinct phases. The first phase was one of protracted Commonwealth/state disputation over offshore responsibilities, revolving around questions of jurisdiction with respect to the territorial sea and continental shelf. This turbulent period stretched from the early 1950s until 1980 when the Offshore Constitutional Settlement was reached, at which time lingering questions of jurisdiction as between the two spheres of government were finally resolved. Following the years of high politics and offshore turbulence, the P(SL)A during the mid-1980s entered a state of regime maturity. It is only since offshore jurisdiction has been satisfactorily settled that the petroleum regime has stabilized, enabling the Commonwealth to progress its petroleum policies through its superior ability to legislate in respect of the offshore. Concentrating upon jurisdictional difficulties as the impetus for legislative reform tends to discount the other influential factors introduced above, however. The thesis argues that the resolution of jurisdiction was a defining but not an exclusive influence on Commonwealth-state offshore interaction.

A second observation of the reform of the P(SL)A is that the participation of the states in Commonwealth offshore petroleum policy has never been seriously doubted.² Legislative changes have instead endeavoured to find the balance of responsibilities most reflecting the evolving interests and capabilities of the two governmental spheres, given prevailing political conditions and as modified by judicial decisions. The trend of this "policy soup" is the increasing dominance of the national interest as a

² B. Davis, "Environmental Management", in B. Galligan, O. Hughes and C. Walsh (ed), *Intergovernmental Relations and Public Policy* (Allen and Unwin, Sydney, 1991) pp 146-162.

Commonwealth imperative, wherein both spheres of government determine offshore petroleum policy but the former jurisdiction may prevail in the event of disagreement over policy decisions and administration of the regime.³ Joint decision making therefore reflects the necessity of involving the states in continental shelf decision making while preserving the Commonwealth's capacity to exercise ultimate powers of veto. The P(SL)A model has succeeded in providing stability to the volatile policy area of offshore petroleum while being able to accommodate shifts in policy as between the two spheres of government, especially since its overhaul in 1980.

7.1 JURISDICTIONAL DISPUTES OVER THE OFFSHORE

The factor which most influenced the evolution of the P(SL)A regime up until the OCS in 1980—at least as reported in the literature—was the uncertainty pervading offshore jurisdiction. Many authors writing both at the time of the 1967 Australian Petroleum Settlement, and retrospectively a decade later in relation to the OCS, belabour the uncertainties surrounding the assignment of offshore jurisdiction as between the Commonwealth and states.⁴ The conventional view distilled from these contributions is that neither sphere of government could be confident of the outcome of any judicial determination of the question of offshore jurisdiction, however this

³ Policy soup is a term coined by Kingdon to describe how ideas float around within policy communities and either survive and prosper or disappear from the governmental agenda. J. Kingdon, *Agendas, Alternatives and Public Policies* (HarperCollins, Boston, 1984).

⁴ H. Burmester, "Australia and the Law of the Sea - The Protection and Preservation of the Marine Environment", in K.W. Ryan (ed), *International Law in Australia* (The Law Book Company, Sydney, 1984) pp 439-455; E. Campbell, "Regulation of Australian Coastal Fisheries" (1960) 1 *Tasmanian University Law Review* 405-428; Crommelin, op cit fn 1; R. Cullen, "The Encounter Between Natural Resources and Federalism in Canada and Australia" (1990) 24 *U.B.C. Law Review* 275-305; C. Harders, "Australia's Offshore Petroleum Legislation: A Survey of its Constitutional and its Federal Features" (1968) 6 *Melbourne University Law Review* 415-428; R. Lumb, "The Continental Shelf" (1968) 6 *Melbourne University Law Review* 357-369; Lumb, op cit fn 1; J. Taylor, "The Settlement of Disputes Between Federal and State Governments Concerning Offshore Petroleum Resources: Accommodation or Adjudication?" (1970) 11 *Harvard International Law Journal* 358-399.

was posed. Consequently, the Commonwealth enacted quitclaim legislation to grant to the states regulatory responsibilities for offshore oil development right around the coastline.

Uncertainties pertaining to jurisdiction certainly influenced the Commonwealth's decision to leave offshore policy and regulation to state governments. The major limitation with these legal treatments of the subject is their failure to search for other explanatory factors which might better explain the original enacted form of the offshore petroleum regime. A more complete explanation is found in the meeting of industry demands, Commonwealth inexperience, and Australia's extensive maritime domain.

With respect to industry influences, Chapter Two recounted how the offshore industry demanded and was granted generous access rights in respect of Bass Strait oil reserves. On the one hand, offshore operators sought a statutory guarantee of title to the seabed to enable exploration to occur with security of tenure. It was seen, however, that major overseas oil companies allied very closely with the Victorian Government, presenting a formidable alliance which was able to dictate with virtual impunity the terms of the 1967 Settlement. In this regard, the personal strength of Premier Bolte relative to the Prime Minister emerged as particularly influential force on the form of the legislation and its administration.

Equally deterministic of the original P(SL)A was the fact that the Commonwealth was unable to assume administrative or technical control over the offshore in the event of jurisdiction being settled. The Commonwealth is not a major landowner and certainly had negligible experience in managing natural resources. Indeed, the only previous foray into marine resources policy was enactment in 1952 of the *Fisheries Act*, which the Commonwealth immediately vested to the administration of states because of their historic role as fisheries managers. For these reasons of

incapacity, the Commonwealth did not desire either asserting or clarifying offshore jurisdiction with respect to offshore petroleum, while state governments avoided doing the same out of recognition of their own weak position at law.

The denominator to these early policy development efforts—and indeed it is still as influential factor in inter-governmental relations today—is the extensiveness of Australia's maritime domains. Every Australian state possesses a lengthy coastline, an incident of geography that few observers have recognised despite being a fundamental influence on the nature of Commonwealth/state interaction over the offshore.⁵ Insofar as petroleum policy is concerned, the fact of reserve discoveries in the 1960s being constrained to Bass Strait served only to inspire all state governments to settle on terms that would deliver similar benefits to all states, once prospects were discovered elsewhere around the coastline. As this expectation went unrealized, so too did the interest of all states in asserting claims to the continental shelf and achieving commonality in policy.

Perhaps the best illustration of the tendency amongst scholars to overstate the uncertainties associated with offshore jurisdiction as a dominant policy factor is enactment of the *Seas and Submerged Lands Act* 1973 (Cth) by the Whitlam Government. As the thesis recounted, Whitlam had longed demanded that the Commonwealth assert its jurisdiction over the offshore through legislation, and his ascent to office provided the opportunity to advance this policy. Put another way, enactment of the SSLA very much challenged the pretence of jurisdictional uncertainty that had hitherto been used to characterise offshore petroleum policy. At the same time, the Commonwealth under Whitlam's prime ministership promoted a very

⁵ M. Haward, *Federalism and the Australian Offshore Constitutional Settlement* (University of Tasmania, PhD thesis, 1992); B. Opeskin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395-431.

centralist approach to government, and the SSLA was the offshore component of this political philosophy.

The Commonwealth's interventionist approach to policy predicated a rapid deterioration in relations with state governments and industry. As shown in Chapter Three, an important point to arise in this context was the indifference of the Commonwealth to the concerns of state governments, even those of the same party. Enactment of the SSLA revealed the limits of party and policy alignment between jurisdictions when basic political philosophies—and substantial resources—are at stake. Stevenson is one author to remark upon this occurrence –

The corollary to this is that federal-state relations are relatively more harmonious, all other things being equal, when the same party holds office at both levels of government. In such circumstances each level of government is reluctant to embarrass a 'friendly' government at the other level by open displays of hostility, and there are also avenues of informal liaison and negotiation not open to governments of opposite parties ... If both levels of government are non-Labor, the federal government will tend to share its adversary's belief in the desirability of preserving strong ties, while if both levels of government are Labor the state government will tend to share its adversary's belief in the virtues of centralization. However, Mr Gorton's desire to assert federal sovereignty over the continental shelf, and the resistance of state Labor governments when the Whitlam government tried to do the same, suggests that neither generalization can be pressed too far.⁶

Interaction between both spheres of governments became so acrimonious under Whitlam that the Commonwealth ceased meeting both with the states through the ministerial council [AMEC], and peak industry groups such as APEA. The importance of this observation is that it again highlights the role of individuals in the debate over offshore petroleum, and natural resources policy more generally. Although the Commonwealth promoted a very centralised approach to government, the complete breakdown in inter-governmental communication which occurred in the early 1970s was the

⁶ G. Stevenson, *Mineral Resources and Australian Federalism* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1976), p 66.

result of the personal style of Whitlam's resources minister, [O'Connor] who held states and industry in complete disdain. As occurred with Bolte in 1967, key individuals are seen to have played an influential role in exacerbating or moderating policy positions.

The next period of debate over offshore responsibilities was driven by the extensiveness of Australia's maritime domains. All Australian states were dispossessed of territory and identity by the SSLA, and sought to have this situation remedied when a sympathetic government was elected to office. Chapter Four described how the Fraser Government provided the political capital to enact legislation returning coastal waters to the states, but did so under terms that were restrictive and narrowly defined. Having become accustomed to its newly found powers over the offshore, it appears that the Commonwealth was reluctant to abandon these to the states in spite of its pronouncements to the contrary.⁷

Unlike the earlier petroleum Agreement, the Offshore Constitutional Settlement of 1980 was developed without the influence of industry, but was very much refined by law officers. Because it was excluded from developments the offshore petroleum industry was convinced that the new legislation would be simply another chapter in the offshore saga.⁸ The following editorial reflects the sentiments of the OCS held by a number of commentators –

Moreover, the legislation is to a large extent a framework within which administrative practices must perforce develop if there is to be harmonious co-operation between the Commonwealth and the States. Unforeseen problems can still arise, and the settlement should not be regarded as definitively marking the end of all negotiations between the

⁷ R. Kay and C. Lester, "Benchmarking the Future Direction for Coastal Management in Australia" (1997) 25 *Coastal Management* 265-292.

⁸ K. Orchison, "Petroleum Exploration Offshore", in *Australia's Maritime Horizons in the 1980s* (Occasional Papers in Maritime Studies, Australian Centre for Maritime Studies, Canberra, 1982) pp 66-71.

Commonwealth and State Governments concerning this area of offshore responsibilities.⁹

Some observers of the OCS did, however, impart a more hopeful prognosis of its potential as a new legislative framework. Saunders and Wiltshire remarked "It is likely that it will form the permanent basis for the regulation of activities offshore Australia."¹⁰ Subsequent to its enactment, the OCS has proved remarkably resilient in providing stability to an otherwise volatile area of policy.

7.2 REGIME MATURITY

The exclusion of industry from OCS negotiations, coupled with the fact that the Commonwealth under Fraser only returned to states some of their former capabilities, represents the beginning of the formation of a Commonwealth offshore petroleum policy. As well as being generally excluded from developing the OCS, the offshore industry was kept distant from discussions over the formative Law of the Sea Convention proceeding in parallel. This observation is important in revealing that the oil industry—which in 1967 had been so influential in offshore policy—became marginalised as a factor shaping offshore legislative reform. The content of the Commonwealth's offshore petroleum policy was instead sharpened by inter-governmental negotiations over offshore jurisdiction. It was the nexus between the foreign and domestic dimensions of continental shelf policy that helped to define the form of the amended regimes arising under the OCS.

⁹ Anon., "The Offshore Constitutional Settlement" (1980) 54 *The Australian Law Journal* 517-519, p 519.

¹⁰ C. Saunders and K. Wiltshire, "Fraser's New Federalism 1975-1980: An Evaluation" (1981) 26 *Australian Journal of Politics and History* 355-371, p 363.

Much has been made of the cooperative spirit of the OCS, and the return to states of significant offshore capabilities thereunder.¹¹ As argued in this thesis, analyses have tended to enthuse over the gloss of the broad offshore framework and overlook the detail of some of the particular legislative provisions settled in 1980. Upon closer review, it was seen that the Commonwealth under Fraser's prime ministership returned to the states only some of the functions they previously enjoyed while retaining their assistance in regime administration, relying upon the desire of state governments to be involved in offshore policy.

During the immediate post-OCS years, the extent of the states' maritime domains became much less important in shaping Commonwealth policy at least insofar as offshore petroleum is concerned. Around the time that the OCS was being concluded, the north-west shelf emerged as a highly prospective oil-bearing region, and soon exceeded Bass Strait as the major productive offshore province. Elsewhere around Australia the continental shelf was proven to be devoid of viable oil reserves. The effect of this exploration activity was that state governments lost interest in maintaining the common offshore mining code that had hitherto served as the basis for offshore exploration. As a result, individual regimes evolved in relation to the two productive fields adjacent to Victoria and Western Australia, the details of which were shaped by local influences within a national framework. For example, with respect to the latter the strength of the Western Australian premier [Court] was seen to be instrumental in securing an offshore arrangement peculiar to that state which constrained the Commonwealth's ability to dominate petroleum policy in adjacent waters.

¹¹ Crommelin, *op cit* fn 1; R. Cullen, "Canada and Australia: A Federal Parting of the Ways" (1989) 18 *Federal Law Review* 68-83; C. Harders, "Commonwealth and State Jurisdiction Over Off-Shore Areas" (1977) 1 *Australian Mining and Petroleum Law Association Journal* 7-16.

The OCS therefore signals the beginning of the maturity of the P(SL)A regime. Offshore jurisdiction was finally settled, and the influence of the oil industry on offshore policy-making in recess. Because the foundations of offshore petroleum policy were set, the Commonwealth could devote greater attention to modifying offshore relations through formal inter-governmental mechanisms, such as the joint authority and ministerial council structures.

The first test of the efficacy of the OCS arrangements occurred immediately upon proclamation of the relevant legislation. Chapter Five detailed the election to office of the Hawke Labor Government, which was implacably opposed to the OCS and threatened to overturn the arrangements reached thereunder by the previous Commonwealth. This policy was enunciated in Parliament in unmistakable terms –

It should be well understood that a future Labor government will have no bar of this arrangement or the arrangement under the Petroleum (Submerged Lands) Act for the establishment of joint Commonwealth-State authorities over petroleum mining. The likelihood is that the coastal waters legislation will fail upon its first test before the High Court, thereby obviating the need to introduce amending legislation.¹²

Notwithstanding its hostility towards the OCS, the Hawke Government did not alter the basis of the offshore accord settled in 1980. On the one hand, very real—perhaps insurmountable—constitutional constraints ensured that the OCS would withstand alteration by a future Commonwealth government, as was explicit in its development. However, as this thesis argues, the Commonwealth under Hawke learned to advance its policies within the broad parameters of the OCS by amending the P(SL)A to ensure that the Commonwealth would ultimately prevail in the event of disagreement with the states over offshore petroleum policy. As detailed in Chapter Five, the

¹² *Hansard*, House of Representatives, 1 May 1980, p 2533.

Hawke Government also imposed new revenue regimes upon offshore activity, against the wishes of Labor states.¹³

That the Commonwealth could legislate in this manner without reopening basic jurisdictional questions testifies to its improved capabilities as a policy maker following proclamation of the OCS. Moreover, internal regime reform confirms the growing maturity of the P(SL)A, as commented upon by Hunt –

Because the inexperience ...with offshore petroleum laws is relatively limited, there is value in having a system under which amendments can be easily procured in response to identified deficiencies. That such needs will arise in an immature legal regime is underscored by the number of amendments to the (Cth) Petroleum (Submerged Lands) Act which have been deemed necessary since 1983.¹⁴

The OCS arrangements endured intact under the Hawke Government because these were sufficiently flexible to allow shifts in political priorities within the offshore jurisdictional framework settled in 1980. This shift amounted to an acceleration of Commonwealth policy direction established previously under the Fraser Government. The P(SL)A has now been amended to firmly empower the Commonwealth as the final arbiter in a joint decision-making regime for continental shelf policy.

There is little scope to further refine the legislation through amendment, given the mature condition of the regime and its separation from basic jurisdictional questions. Chapter Six suggested that the policy bases for administering the legislation are less developed, however, and it is in this area that considerable scope exists for evolution. Following the election of the Howard Government in 1996, the Commonwealth prepared and released two policy statements as the next phase in the Australian offshore saga. The first

¹³ B. Head, "Economic Development in State and Federal Politics", in B. Head (ed), *The Politics of Development in Australia* (Allen & Unwin, Sydney, 1986) pp 3-55.

¹⁴ C. Hunt, "The Offshore Petroleum Regimes of Canada and Australia: Some Comparative Observations" (1990) 9 *Australian Mining and Petroleum Law Association Bulletin* 103-111, p 107.

of these initiatives was the inaugural oceans policy, released as a draft document after exhaustive consultation with maritime stakeholders in- and outside the Commonwealth.

In terms of the argument made in this thesis, the most significant aspect of the oceans policy is that the OCS regimes will be retained unchanged but an increased attempt will be made to harmonize sectoral activities under a strategic umbrella. Complementing the oceans policy initiative is the release of the first ever Commonwealth resources policy. This policy complementarity derives from a commitment in the resources policy to retain the P(SL)A and amend it in response to emergent needs, such as longterm production licences and to effectuate offshore boundary changes made pursuant to the LOS Convention. The Commonwealth is also committed to reviewing the RRT regime applicable to adjacent areas, but it seems unlikely that this impost will be removed, portending of some future tensions with Western Australia.

The preparation of a document specifying the government's intention for the offshore petroleum sector logically follows the history of legislative reform. It seems likely, though, that the development of the oceans policy provided the impetus to the petroleum sector to prepare a policy protecting its own interests. To be sure, the P(SL)A regime is promoted within the oceans policy as model legislation supporting enhanced cross-sectoral integration. However, as described in Chapter Six, thorny issues relating to oceans policy delivery are now being contemplated by Commonwealth agencies. The resources policy statement has better positioned the offshore petroleum sector to contribute to this debate, if not allow it to even expand its interests relative to other offshore sectors.

7.4 CONCLUDING COMMENTS

To help conclude this thesis, it is useful to return to some of the contributions in respect of the P(SL)A made by other analysts. A concise summarization of the offshore situation from a legal perspective is made by Crommelin, who frames the offshore petroleum legislation in the following manner –

Offshore the Commonwealth occupies a predominant position with respect to mineral exploration and production, at least beyond the territorial sea. For historical and political reasons the States continue to participate in the administration of the Commonwealth petroleum regime, and they also share in petroleum royalties and other revenues. In contrast with the onshore position, however, they enjoy their offshore status at the will of the Commonwealth.¹⁵

Despite adopting a strictly legal assessment of the P(SL)A regime, Crommelin is nonetheless sensitive to the Commonwealth's need to involve the states in offshore decision making less out of reasons of law than for purely functional requirements. Like many other analyses, though, Crommelin overlooks the elements of the regime that have ensured the participation of state governments in setting offshore petroleum policy, such as making exploration and production decisions as the joint authority. Revenue collection flowing therefrom is a related but separate aspect of offshore policy, one which the regime is now ripe to address. Other authors have also tended to confuse these elements of offshore petroleum policy making.¹⁶

Another, more recent, analysis is attentive to the success of the joint authority structure as a device for formalizing interaction over offshore petroleum policy –

¹⁵ M. Crommelin, "The Mineral Exploration and Production Regime Within the Federal System", in P. Drysdale and H. Shibata (ed), *Federalism and Resource Development: The Australian Case* (George Allen and Unwin, Sydney, 1985) p 104.

¹⁶ Cullen, op cit fn 1; E. Fitzgerald, "The Seaweed Rebellion: Federal-State Conflicts Over Offshore Energy Development in the United States, Canada, and Australia" (1992) 7 *Connecticut Journal of International Law* 255-309.

When one moves further offshore, as is the case for most of the offshore oil exploration and production this jurisdiction problem does not arise ... The co-operative approach among them all is one of the success stories as to inter-governmental structures so that the various *Petroleum (Submerged Lands) Acts* provide a sensible legislative structure under which this important commercial activity can be conducted without the needs of the marine environment placing undue burdens on it.¹⁷

The important contribution made by White to this area of scholarship is his appreciation of the P(SL)A as a mechanism for resolving policy between the two spheres of government. This analysis neglects, however, the broader public good dimensions of offshore petroleum policy, namely environmental protection. The thesis has shown that offshore development has escaped serious environmental review, an area of policy that could be informed by the United States experience.

As introduced in Chapter One, this study was motivated to understand the differences between the offshore petroleum regimes of the two federations, as has been suggested by earlier studies.¹⁸ Whilst production continues apace off Australia—indeed, in a global survey the north-west shelf was identified as the preferred place for offshore investment¹⁹—activity along the U.S. west coast is in a state of gridlock. This breakdown in decision making is due to the absence of meaningful avenues for state input to federal decisions, and the multiplicity of statutory environmental requirements.

As I have argued elsewhere, the Commonwealth could borrow some of the more interesting mechanisms available under U.S. laws pertaining to the environment.²⁰ Adopting the consistency rule found in the Coastal Zone

¹⁷ M. White, *Marine Pollution Laws of the Australasian Region* (The Federation Press, Sydney, 1994), 262.

¹⁸ R. Hildreth, "Managing Ocean Resources: New Zealand and Australia" (1991) 6 *International Journal of Estuarine and Coastal Law* 89-126.

¹⁹ "Price drop no barrier to offshore oil fields" *The Australian* 22 June 1998.

²⁰ N. Evans and J. Bailey, "Jurisdiction and Offshore Petroleum in Australia: Creating Symmetry Between the Commonwealth and States by Sharing Benefits and Avoiding Costs" (1997) 33 *Ocean and Coastal Management* 173-204.

Management Act would enhance efforts at integrating oceans policy, notwithstanding the Commonwealth's repeated resistance to this proposition. Similarly, relaxing rules of standing, or granting disaffected third parties greater access to the courts, would ensure that offshore development proceeds with greater environmental diligence than is currently the case where responsibility for the environment is effectively internalized to the petroleum sector.

Clearly, there are lessons to be exchanged from the collective offshore experiences of coastal federations. A useful first step in this direction would be to conduct comparative regime studies across sectors and countries, to distill those features worth emulating and those which should be abandoned.

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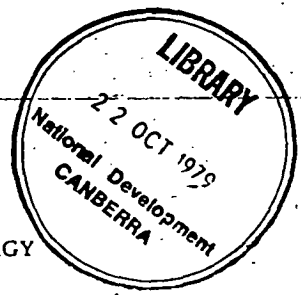
Appendices

Australian Petroleum Settlement (1967)

OCS Selected Documents (1980)

Oceans Policy Documents (1998)

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DEPARTMENT OF MINERALS AND ENERGY

**Agreement relating to the
Exploration for, and the Exploitation of, the Petroleum
Resources, and certain other Resources, of the
Continental Shelf of Australia and of certain
Territories of the Commonwealth and of certain
other Submerged Land.**

Australian Government Publishing Service
Canberra 1975

Agreement relating to the Exploration for, and the
Exploitation of, the Petroleum Resources, and
certain other Resources, of the Continental Shelf of
Australia and of certain Territories of the
Commonwealth and of certain other Submerged Land.

THIS AGREEMENT is made the sixteenth day of October, One thousand nine hundred and sixty-seven, Between THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA (in this Agreement called "the Commonwealth Government") of the first part, THE GOVERNMENT OF THE STATE OF NEW SOUTH WALES of the second part, THE GOVERNMENT OF THE STATE OF VICTORIA of the third part, THE GOVERNMENT OF THE STATE OF QUEENSLAND of the fourth part, THE GOVERNMENT OF THE STATE OF SOUTH AUSTRALIA of the fifth part, THE GOVERNMENT OF THE STATE OF WESTERN AUSTRALIA of the sixth part and THE GOVERNMENT OF THE STATE OF TASMANIA of the seventh part (each of the parties of the second, third, fourth, fifth, sixth and seventh parts being in this Agreement referred to as a "State Government" and the expression "the State Governments" in this Agreement meaning, unless the contrary intention appears, all those State Governments).

WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources:

AND WHEREAS Australia is a party to the Convention on the Continental Shelf signed at Geneva on the twenty-ninth day of April, One thousand nine hundred and fifty-eight, in which those rights are defined:

AND WHEREAS the exploration for and the exploitation of the petroleum resources of submerged lands adjacent to the Australian coast would be encouraged by the adoption of legislative measures applying uniformly to the continental shelf and to the sea-bed and subsoil beneath territorial waters:

AND WHEREAS the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of those submerged lands:

AND WHEREAS the Governments of the Commonwealth and of the States have accordingly agreed to submit to their respective Parliaments legislation relating both to the continental shelf and to the sea-bed and subsoil beneath territorial waters and have also agreed to co-operate in the administration of that legislation:

NOW IT IS HEREBY AGREED as follows:—

PART I.—PRELIMINARY.

Operation of
Agreement.

1.—(1.) Subject to sub-clause (2.) of this clause, the provisions of this Agreement shall take effect upon the signature of this Agreement on behalf of all of the parties.

(2.) Except as provided in sub-clause (3.) of this clause, Part III. of this Agreement shall not have any force or effect in relation to the adjacent area of a State until the Acts of the Parliaments of the Commonwealth and of the States contemplated by clauses 3, 4 and 5 have come into operation.

(3.) Part III. of this Agreement may by agreement between the Commonwealth Government and a State Government be brought into force and effect in relation to the adjacent area of the State when the Acts of the Parliaments of the Commonwealth and of the State contemplated by clauses 3, 4 and 5 have come into operation in relation to that adjacent area.

Definitions.

2.—(1.) In this Agreement, unless the contrary intention appears—

“clause” means clause of this Agreement;

“Commonwealth” means Commonwealth of Australia;

“Government” means a Government a party to this Agreement and the expression “the Governments” means all those Governments;

“State” means one of the States aforesaid and the expression “the States” means all those States;

“the Common Mining Code” means, in relation to the adjacent area of a State, the Commonwealth Mining Code and the State Mining Code of that State in their application to that adjacent area;

“the Commonwealth Mining Code” means Part III. of the Commonwealth Act designated the Petroleum (Submerged Lands) Act and the Commonwealth Acts designated the Petroleum (Submerged Lands) (Royalty) Act, the Petroleum (Submerged Lands) (Exploration Permit Fees) Act, the Petroleum (Submerged Lands) (Production Licence Fees) Act, the Petroleum (Submerged Lands) (Pipeline Licence Fees) Act and the Petroleum (Submerged Lands) (Registration Fees) Act that are contemplated by clauses 3 and 5;

“the Commonwealth Minister” means the Minister of State of the Commonwealth for the time being responsible for the administration of the Commonwealth Mining Code and includes a Minister or other member of the Federal Executive Council who is for the time being acting on behalf of that Minister; and

“the State Mining Code” means Part III. of the relevant State Act and any other relevant State Act or Acts that is or are contemplated by clauses 4 and 5.

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(2.) A reference in this Agreement to an Act of the Commonwealth or of a State shall, except where the contrary intention appears, be read as a reference to that Act as from time to time amended in accordance with this Agreement.

(3.) Where a word, expression or reference that is defined, or for which an interpretation is given in an Act of the Parliament of the Commonwealth or of a State contemplated by this Agreement is used in this Agreement, the word, expression or reference shall, unless the context otherwise requires, have for the purposes of this Agreement the meaning or interpretation attributed or given to it by those Acts.

PART II.—THE COMMONWEALTH AND STATE LEGISLATION.

3. The Commonwealth Government will submit to the Parliament of the Commonwealth Bills for Acts that contain, apart from any formal or transitional provisions, provisions to the effect of the draft Bills set out in the First Schedule to this Agreement.

Submission of
Commonwealth
Bills.

4. Each State Government will submit to the Parliament of the State a Bill for an Act, or Bills for Acts, that, apart from any formal or transitional provisions, contains or contain provisions to the effect of the draft Bill set out in the Second Schedule to this Agreement.

Submission of
State Bills.

5. Each Government will use all reasonable endeavours to secure the passing and the coming into operation of the Bill or Bills introduced by it.

Passage of
Bills.

6.—(1.) Except in accordance with an agreement between the Commonwealth Government and the State Governments, a Government will not submit to its Parliament a Bill for an Act that would either—

Amendments.

- (a) amend or repeal an Act that is contemplated by the preceding provisions of this Part; or
- (b) in any material respect affect the scheme of the legislation that is contemplated by this Agreement.

(2.) The last preceding sub-clause does not apply to a Bill for an Act in so far as the effect of its provisions would be formal or transitional.

7. Except in accordance with an agreement between the Commonwealth Government and the State Governments—

Regulations.

- (a) regulations under an Act that is contemplated by the preceding provisions of this Part (other than formal or transitional regulations) in relation to the Commonwealth Mining Code or the State Mining Code shall not be made, amended or repealed; and
- (b) regulations under any Act of the Parliament of the Commonwealth or of a State that will affect in any material respect the scheme of the legislation that is contemplated by this Agreement shall not be made.

8. The provisions of the last two preceding clauses do not apply to legislation with respect to or in its application to a Territory under the authority of the Commonwealth not forming part of the Commonwealth.

Legislation in
respect of
External
Territories.

PART III.—ADMINISTRATION OF THE COMMON MINING CODE.

Administration
of the Common
Mining Code.

9. The Common Mining Code in respect of the adjacent area of a State shall be administered by the person who is the Designated Authority for the purpose of the Commonwealth Mining Code and of the State Mining Code in respect of that adjacent area.

Assistance
between
Governments.

10. Where in special circumstances a Government requests another Government to provide assistance in implementing the legislation contemplated by this Agreement, the other Government will, so far as it is reasonably able to do so, provide the assistance.

State
Consultation
with
Commonwealth.

11.—(1.) Except in so far as the Commonwealth Government has informed the State Government that it is not necessary to do so, a State Government will consult the Commonwealth Government—

- (a) before a permit, licence, pipeline licence, access authority or special prospecting authority under the Common Mining Code in relation to the adjacent area of that State is granted, renewed or varied;
- (b) before approval is given to any transfer of a permit, licence, pipeline licence or access authority that has been so granted; or
- (c) before approval is given to any instrument by which a legal or equitable interest in or affecting an existing or future permit, licence, pipeline licence or access authority (being a permit, licence, pipeline licence or access authority under the Common Mining Code in relation to the adjacent area of that State) is or may be created, assigned, affected or dealt with, whether directly or indirectly.

(2.) The Commonwealth Government will, in considering a matter referred to in the last preceding sub-clause, take into account the following Commonwealth responsibilities under the Constitution, namely—

- (a) trade and commerce with other countries and among the States, including navigation and shipping;
- (b) external affairs;
- (c) taxation, including taxes in the nature of duties of customs and excise;
- (d) defence;
- (e) lighthouses, lightships, beacons and buoys;
- (f) fisheries in Australian waters beyond territorial limits; and
- (g) postal, telegraphic, telephonic and other like services,

and will, with all due expedition, give a decision accordingly.

(3.) In coming to a decision, the Commonwealth Government will take into account only matters reasonably related to the responsibilities specified in the last preceding sub-clause.

(4.) When giving a decision that is not consistent with the action proposed by the State Government, the Commonwealth Government will specify the Commonwealth responsibility or responsibilities with respect to which the decision is given and, unless it is considered by the Commonwealth Government undesirable in the national interest to do so, inform the State Government of the grounds of the decision.

(5.) A State Government will accept, and will ensure that effect is given to, a decision of the Commonwealth Government with respect to a responsibility of the Commonwealth taken into account as aforesaid.

12. Each State Government will, in the administration of the Common Mining Code in relation to the adjacent area of the State, take all reasonable steps to secure compliance with the obligations of Australia under the Convention.

Convention on the Continental Shelf. 5

13. A State Government will, when so requested by the Commonwealth Government, ensure that copies of the returns, reports, maps, notifications, logs, records and the like material and adequate portions of all cores, cuttings and samples that are received by it or its authorities by virtue of the operation of the Common Mining Code in relation to the adjacent area of the State are, as soon as reasonably practicable after receipt, forwarded to the Commonwealth Government.

Provision of Returns, etc.

14.—(1.) A condition may be included in a permit or licence under the Common Mining Code in its application to the adjacent area of a State to the effect that the permittee or licensee shall comply with any requirement of the Designated Authority administering the Common Mining Code that all or any of the petroleum produced pursuant to the permit or licence shall be refined in the State, or, in the case of petroleum in a gaseous state, shall be used, before or after processing, within the State.

Refining and Use of Petroleum.

(2.) A requirement referred to in sub-clause (1.) of this clause shall not be made unless there has been consultation between the Commonwealth Minister and the appropriate Minister of the State concerning the requirement and the Ministers are in agreement that the requirement should be made.

(3.) When consulting, the Commonwealth Minister and the State Minister shall consider the interests of the State and of the Commonwealth generally and the Commonwealth Minister shall not be entitled to withhold his agreement to the making of the requirement unless it is reasonable in the national interest to do so having regard to the economic and efficient exploitation, processing and use of the petroleum resources to which the requirement would relate.

15.—(1.) If, for a reason reasonably related to a responsibility of the Commonwealth specified in sub-clause (2.) of clause 11, the Commonwealth Government so requests, an area or areas of the adjacent area of a State will for the time being be made not available for the granting therein of permits, licences or pipeline licences under the Common Mining Code.

Non-availability of Areas.

(2.) When making a requirement for the purposes of sub-clause (1.) of this clause, the Commonwealth Government will specify the Commonwealth responsibility or responsibilities with respect to which the requirement is made and, unless it considers that it is undesirable in the national interest to do so, inform the State Government of the grounds upon which the requirement is made.

16.—(1.) If a petroleum pool extends or is reasonably believed to extend from an adjacent area of a State or Territory into—

Unit Development.

- (a) lands of the State or Territory not being part of the adjacent area of that State or Territory;
- (b) lands of an adjoining State or Territory, not being part of the adjacent area of that State or Territory; or

(c) the adjacent area of an adjoining State or Territory,

the Designated Authority or Authorities concerned and, where appropriate, the other petroleum mining authority or authorities involved shall consult concerning the exploitation of the petroleum pool.

(2.) Directions for the exploitation of the petroleum pool in accordance with the provisions in relation to unit development of the Common Mining Code or of the Commonwealth Mining Code in its application with respect to a Territory shall not be given to a licensee until after a scheme for the exploitation of the petroleum pool has been agreed upon or approved by the relevant authorities or otherwise than in accordance with the scheme so agreed upon or approved.

Pipeline Licence
over adjoining
Adjacent Area.

17. Where, for the purpose of conveying petroleum produced from the adjacent area of a State or Territory, the Designated Authority in respect of the adjacent area has granted, or proposes to grant, a pipeline licence in respect of a pipeline that extends, or will extend, to the boundary between the adjacent area and an adjoining adjacent area, the Designated Authority in respect of that adjoining adjacent area shall accord all appropriate and reasonable consideration and treatment to an application for the grant of a pipeline licence to enable the pipeline to be continued across that adjoining adjacent area.

Directions and
Exemptions.

18.—(1.) A direction under the Common Mining Code that is inconsistent with the regulations made in relation thereto shall not be given and an exemption from compliance with the conditions of a permit, licence, pipeline licence, access authority or special prospecting authority shall not be granted by a Designated Authority unless there has been consultation between the Commonwealth Minister and the appropriate State Minister or their delegates concerning the proposed direction or exemption.

(2.) Consultation as provided for by sub-clause (1.) of this clause is not required—

- (a) in cases concerning which the Commonwealth Minister has informed the appropriate State Minister that he does not consider consultation to be necessary; or
- (b) in a case of such urgency that consultation is not reasonably practicable.

(3.) The Designated Authority shall, as soon as reasonably practicable after a direction or an exemption referred to in sub-clause (1.) of this clause has been given or granted, whether or not following consultation in accordance with the sub-clause, give a notice in writing accordingly to the Commonwealth Minister together with particulars of the direction or exemption.

Sharing of
Royalties.

19.—(1.) After the coming into force of the Common Mining Code in relation to the adjacent area of a State, royalties received in respect of petroleum produced from that adjacent area shall, subject to sub-clause (2.) of this clause, be shared as follows—

- (a) as to so much as is royalty, not being over-ride royalty, payable at a rate that does not exceed ten per centum of the value at the

well-head of the petroleum in respect of which royalty is payable—four-tenths shall be allocated to the Commonwealth and the remaining six-tenths shall be allocated to the State; and

(b) any royalty consisting of over-ride royalty in addition to the royalty referred to in paragraph (a) of this sub-clause shall be allocated to the State.

(2.) If the rate at which royalty is payable under a licence includes over-ride royalty and that rate is reduced by the Designated Authority in accordance with the relevant provisions of the Common Mining Code and of the next succeeding clause, the royalties received at the lower rate so fixed shall for the purposes of the operation of paragraphs (a) and (b) of sub-clause (1.) of this clause be deemed to be composed of royalty other than over-ride royalty and of over-ride royalty in the same respective proportions as those that comprised royalty other than over-ride royalty and over-ride royalty before the reduction.

(3.) Any additional amount received by reason of late payment of royalty shall be allocated between the Commonwealth and the State in the same respective proportions as the royalty in respect of which the amount is payable is to be allocated in accordance with the preceding sub-clauses of this clause.

20. The rate at which royalty is payable in respect of petroleum recovered from a well in the adjacent area of a State shall not be reduced by the Designated Authority except by agreement between the Commonwealth Minister and the appropriate Minister of the State.

Reduction of
Royalty.

21. The Designated Authority shall consult the Commonwealth Minister before exercising the power under the Common Mining Code to determine, otherwise than by agreement with the permittee or licensee, the value of any petroleum.

Determination
of Value
for Royalty.

22. As between the Commonwealth and the State, the State shall be entitled to the benefit of all moneys, other than royalties, payable under the Common Mining Code in relation to the adjacent area of the State, including moneys paid in respect of the grant of a permit or licence over a block or blocks within the adjacent area of the State with respect to which a permit or licence was previously in force but which has or have again become available for the grant of a permit or licence.

Moneys other
than Royalties.

PART IV.—GENERAL PROVISIONS.

23. The Commonwealth Government and the State Governments will confer from time to time concerning the operation and administration of the legislation of the Parliaments of the Commonwealth and of the States contemplated by this Agreement and concerning any other matters that may arise out of or in connexion with this Agreement.

Governments
to confer.

24.—(1.) This Agreement shall not affect any right of the Commonwealth or of a State, by itself or by an authority or corporation on its behalf, in an adjacent area to carry on petroleum mining operations.

Commonwealth
and State
Operations.

(2.) Where the Commonwealth Government or a State Government proposes itself, or by an authority or corporation on its behalf, to carry on

petroleum mining operations in an adjacent area, the State Government and the Commonwealth Government will confer in relation to the proposed operations and, in the case of proposed operations by or on behalf of a State Government, the provisions of sub-clauses (2.), (3.), (4.) and (5.) of clause 11 shall, with appropriate modifications, apply to the State Government and the Commonwealth Government as if the carrying on of the proposed operations were a matter referred to in sub-clause (1.) of that clause.

(3.) A Government by or on behalf of which petroleum mining operations are carried on in an adjacent area shall ensure, as far as appropriate and reasonably practicable, that those operations are carried on in conformity with this Agreement and the Common Mining Code and that all acts and things relating or incidental to those operations shall be done which the Common Mining Code, if it applied, would require to be done.

(4.) If petroleum is produced from the adjacent area of a State by the Commonwealth Government or a State Government or by an authority or corporation on behalf of either, the Government concerned shall ensure that the share of the other Government under paragraph (a) of sub-clause (1.) of clause 19 to the moneys that would be payable by a private producer as a permittee or licensee in respect of the petroleum is accorded to the State or to the Commonwealth, as the case may be.

(5.) In this clause "petroleum mining operations" means—

- (a) prospecting for petroleum;
- (b) recovering petroleum;
- (c) constructing and operating pipelines; and
- (d) doing all other things incidental thereto.

Variation, etc.,
of Agreement.

25.—(1.) This Agreement shall not be capable of being varied or revoked or of being determined by any Government except by agreement between all of the Governments for the time being parties thereto.

(2.) The last preceding sub-clause shall not prejudice the right of any Government to determine this Agreement in relation to a Government that is in default thereunder.

Construction
and Effect of
Agreement.

26. The Governments acknowledge that this Agreement is not intended to create legal relationships justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof.

The offshore constitutional settlement between the Commonwealth and the States

At the Premiers Conference on 29 June 1979, the Commonwealth and the States completed an agreement of great importance for the settlement of contentious and complex offshore constitutional issues. The agreement marked the solution of a fundamental problem that has bedevilled Commonwealth-State relations, and represents a major achievement of the policy of co-operative federalism.

International background

Particularly since the Proclamation by President Truman in 1945 of jurisdiction and control over the continental shelf adjacent to the United States, the international law of the sea, as it relates to offshore areas, has been one of the great growing points—one of the areas of major change—in the law of nations.

The factors inducing change in the substantive law were basically technological in character: rapid technological developments in the means of communication, in the methods of fishing and in the techniques of seabed mining and drilling. The technological revolutions of the 20th century brought under the influence of man's new capabilities great areas of the high seas and of the seabed beneath them. These developments have been spurred on by a sharp increase in the demand for resources, both biological and mineral, of the sea and the seabed.

Australian continental shelf

Australia's major national interests in the law of the sea are based on its geographical and economic position as a great island continent, relatively, though not completely, remote from other countries. In 1953 Australia by Proclamation declared its sovereign rights over the continental shelf contiguous to its coast, thus distinctly enlarging its asserted sovereign authority in the offshore area. This jurisdiction was in effect confirmed by the First United Nations Conference on the Law of the Sea held at Geneva in 1958, which drew up four Conventions including the Convention on the Continental Shelf, to which Australia is now a party.

The Second United Nations Conference in 1960 failed to secure agreement on two major issues left unsettled in 1958—the extent of

fisheries jurisdiction and the related question of the breadth of the territorial sea.

Australian 200 nautical mile fishing zone

The Third United Nations Conference on the Law of the Sea began in 1973 what has turned out to be a lengthy consideration of a broad range of related issues. The Ninth Session of the Conference began on 3 March 1980. An informal composite negotiating text has been drawn up and revised. It provides, among other things, for fisheries jurisdiction in a zone extending up to 200 nautical miles from the coastline. Consistently with this text, and relying on the emerging international law on this matter as evidenced by the practice of nations, Australia, with effect as from 1 November 1979, established its 200 nautical mile fishing zone, in which all fisheries activities must be licensed under Australian law.

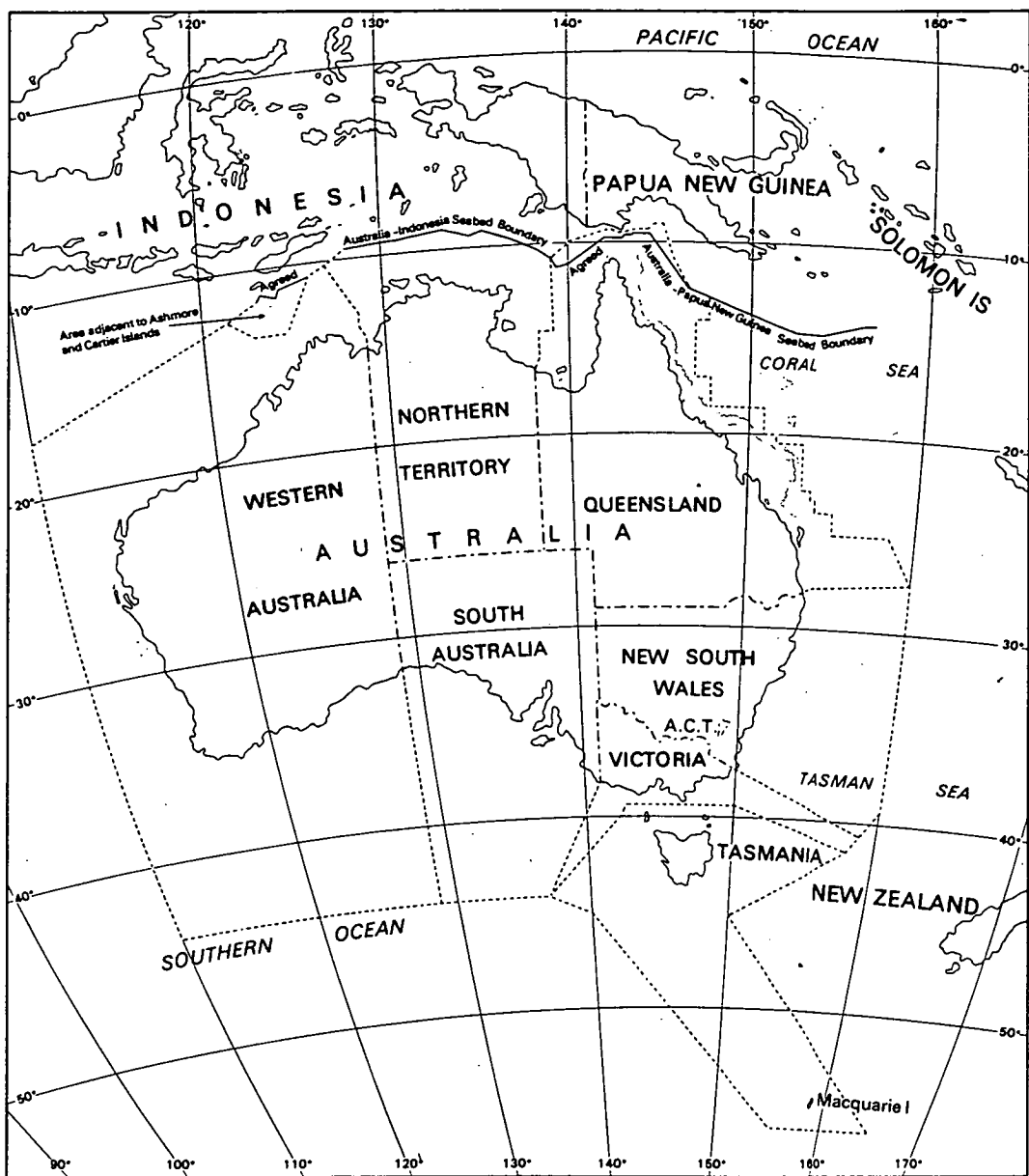
The enlargement of offshore rights also involves responsibilities on the part of the coastal nations concerned—one of the important matters that has concerned the Third United Nations Conference is the balance of these rights and responsibilities, including the issue of freedom of passage and transit through international straits. However, it will be amply evident, even from this brief survey, that the overall trend has been to enlarge the jurisdiction of nations in offshore areas over both the sea and the seabed.

Use of straight baselines and bay closing lines

Also, the 1958 Convention of the Territorial Sea and the Contiguous Zone, to which Australia is a party, permits substantial enlargement of 'internal waters' by the use on deeply indented or island-fringed coasts of 'straight baselines' for measuring the breadth of the territorial sea, and by the adoption of a 24-mile closing line for bays. The effect in particular areas can be to move some parts of the external boundary of Australia's territorial sea some tens of miles seawards.

Commonwealth State issues—Petroleum (Submerged Lands) Acts 1967

The international developments have raised acute issues in a number of federations as to the appropriate division of responsibilities in the offshore area. For Australia these issues crystallised first of all in the Commonwealth-State negotiations in the sixties in relation to the legislative basis for offshore petroleum mining. The course finally chosen was to seek to avoid raising questions concerning the respective constitutional powers of the Commonwealth and the States by agreeing in the 1967 Offshore Petroleum Agreement to the enactment by the Commonwealth and each State of a common petroleum mining code for the 'adjacent area' of each State (see the map opposite) to be administered by a 'Designated



NMP 80/001.1

Produced by the Division of National Mapping, Department of National Development and Energy, Canberra, A.C.T.



PETROLEUM (SUBMERGED LANDS) ACT 1967 (as amended) ADJACENT AREAS

NOTE:

1. The Act applies only in relation to exploration for, and exploitation of, the petroleum resources of such submerged lands included in the adjacent area as have the character either—
 - (a) of seabed or subsoil beneath territorial waters, or
 - (b) of continental shelf within the meaning of the Convention on the Continental Shelf signed at Geneva on 29 April 1958.
2. Adjustment of the Adjacent Area in the Torres Strait area will be necessary when the Torres Strait Treaty enters into force.

Authority'. In practice, the Designated Authority in respect of the 'adjacent area' of each State has been a State Minister, with consultation with the Commonwealth resting not on the legislation but on the Agreement.

However, in 1970 the Territorial Sea and Continental Shelf Bill was introduced into the Parliament in pursuance of the then Government's view that it would serve Australia's national and international interests to have the constitutional position resolved as soon as practicable by the Courts. That Bill was not proceeded with, but its reception served to indicate the highly controversial nature of the subject.

A further development was the 1971 report of the Senate Select Committee on Offshore Petroleum Resources, which concluded that, notwithstanding the advantages which the legislation and its underlying concepts had produced, the national interest was not served by leaving unresolved and uncertain the extent of State and Commonwealth authority in the seabed of the territorial sea and on the continental shelf.

Seas and Submerged Lands Act 1973 and the High Court's decision

The passage of the *Seas and Submerged Lands Act* 1973 followed, and the constitutional issues were resolved by the High Court in 1975 when it upheld—in *New South Wales v. Commonwealth* (1976) 135 CLR 337—the Act's assertion of sovereign rights on the part of the Crown in right of the Commonwealth, as against the States, over the continental shelf. Also, it upheld the Act's assertion of sovereignty on the part of the Crown in right of the Commonwealth over the territorial sea, and also over internal waters outside State limits as at 1901, including the seabed beneath the territorial sea and those waters. In effect, this meant that Commonwealth sovereignty extends, generally speaking, right into low-water mark.

Need for readjustment

The 1975 decision did not mean that States have no power to regulate offshore activities. The subsequent ruling of the High Court in *Pearce v. Florenca* (1976) 135 CLR 507 upheld the application of State fisheries laws in the territorial sea. However, a reordering and readjustment of powers and responsibilities—as between the Commonwealth and the States—were clearly required to take account of the 1975 decision. History, common sense and the sheer practicalities of life mark out the territorial sea, in particular, as a matter for local jurisdiction—that is to say, State jurisdiction—except on matters of overriding national or international importance. On the other hand, revision of existing petroleum mining arrangements is required to properly reflect the Commonwealth's paramount rights over the continental shelf.

Australia's experience in this regard is by no means unique. Similar questions arose earlier in the United States, and subsequently in Canada.

In their case—as in the case of Australia—the ruling by the Courts was that jurisdiction on the part of the central government extended to low-water mark. In the cases of these other federations, as in the case of our own, it has been found that the constitutional ruling is not the end of the matter and that adjustment is necessary.

A practical and co-operative solution

The resulting discussions with the States have now produced a solution agreed to by all States. The talks at both Ministerial and adviser level have focused in a practical way—and in a spirit of co-operative federalism that has taken full account of international, national and State interests—on what matters are appropriate for Commonwealth or, on the other hand, State administration, what matters are appropriate for joint administration, and how the various agreed arrangements should be implemented.

The appropriate Commonwealth-State consultative bodies have been fully involved, including the Australian Minerals and Energy Council, the Australian Fisheries Council, the Australian Environment Council and the Council of Nature Conservation Ministers.

Standing Committee of Commonwealth and State Attorneys-General

The legal aspects of the exercise have been the responsibility of the Standing Committee of Attorneys-General. It has devised innovative and flexible legislative measures to carry out the arrangements that have been agreed. These are now described.

Agreed arrangements

Extension of the legislative powers of the States in and in relation to coastal waters

The Commonwealth Parliament will pass legislation, based on section 51 (38) of the Constitution, to give each State the same powers with respect to the adjacent territorial sea (including the seabed) as it would have if the waters were within the limits of the State.

The legislation will also give each State powers outside the territorial sea in respect of port-type facilities, underground mining extending from land within a State, and fisheries. The power with respect to fisheries will apply to fisheries that, under an arrangement to which the Commonwealth is a party, are to be managed in accordance with the laws of the State concerned, under the offshore fisheries scheme described below.

The status of the territorial sea under international law is to be expressly preserved. Also, savings provisions are to be included:

- to safeguard existing State extra-territorial powers in the offshore area;
- to ensure that laws of the Commonwealth that apply in the territorial sea prevail over any inconsistent State law in accordance with the paramountcy given to Commonwealth laws under section 109 of the Constitution.

The intended use, for the first time since federation, of section 51 (38) of the Constitution is of considerable significance for federal relations as its exercise requires the request or concurrence of the Parliaments of the States concerned. All States have agreed to pass Acts requesting the Commonwealth legislation. A copy of the Victorian Bill is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Documents 1978–79*.

Vesting in the States of the title to seabed beneath the territorial sea

The Commonwealth Parliament will pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea.

This grant of proprietary rights and title will both support the extension of the powers of the States in the territorial sea and provide an assurance to the States that the arrangements relating to the territorial sea will have permanency and stability.

As in the case of the 'Powers' legislation, the status of the territorial sea under international law is to be expressly preserved. Also, it will be necessary to except from the grant any seabed owned or used by the Commonwealth or by a Commonwealth authority for a specific Commonwealth purpose at the time of the grant. In addition, the Commonwealth legislation will reserve the Commonwealth's right to use the seabed for such national purposes as:

- defence
- cables
- navigational aids
- quarantine

Amendment of the Seas and Submerged Lands Act 1973

Consequential amendments will be made to the *Seas and Submerged Lands Act 1973* to ensure that State laws passed under the other legislation will not be invalidated by that Act.

The area involved

The above legislation—and also the petroleum and fisheries arrangements referred to below—will be limited to a territorial sea of 3 miles breadth, irrespective of whether Australia subsequently moves to a territorial sea of 12 miles.

On the other hand, the baselines from which the territorial sea will be measured will be drawn in a way that takes advantage of the international principles authorising the drawing of 'straight baselines' where the coast is deeply indented or fringed by islands, and of closing lines where bays are not more than 24 miles wide. Thus 'straight baselines' will be used to enclose the waters of Investigator Strait adjacent to South Australia. The 'internal waters' on the landward side of these lines will be included in the grants made by the legislation. The result will be to enlarge the area in which the States will enjoy the benefits of the legislation.

The baselines to be adopted are being prepared in close consultation with the States and will be promulgated in due course under the *Seas and Submerged Lands Act 1973*.

Offshore petroleum arrangements outside the 3 mile territorial sea

These will be regulated by Commonwealth legislation alone, consisting of an amended Commonwealth Petroleum (Submerged Lands) Act. Day-to-day administration will continue to be in the hands of the 'Designated Authority' appointed for the 'adjacent area' of each State—that is, the State Minister—and State officials. The existing mining code will be retained and existing permits and licences will not be affected.

However, the legislation will establish for the first time a statutory Joint Authority for each adjacent area consisting of the Commonwealth Minister and the State Minister (Commonwealth-Victoria Offshore Petroleum Joint Authority, and so on). The Joint Authorities will be concerned only with major matters arising under the legislation including:

- determination of the areas to be open for applications for permits;
- the grant and renewal of exploration permits and production licences;
- approval of instruments creating interests in permits or licences;
- determination of permit or licence conditions governing the level of work or expenditure.

In the event of disagreement within a Joint Authority the view of the Commonwealth Minister is to prevail.

Having regard to the remoteness of Western Australia and its other special circumstances, special conditions were agreed in its case. A copy of the agreement is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Other Documents 1978–1979*. However, Commonwealth views based on the national interest are still to prevail in the Joint Authority, as in the case of other States.

Summing up, the new arrangements will ensure that:

- the national interest in offshore petroleum activities can be asserted;
- the valuable role of the States is continued;
- dislocation of ongoing projects is avoided.

The present arrangements for the sharing of royalties between the States and the Commonwealth will be retained.

Offshore petroleum arrangements inside the outer limit of the 3 mile territorial sea

This will be regulated by State legislation alone, administered by State authorities, in recognition of the fact that local matters within the territorial sea are primarily matters for the States. However, the common mining code will be retained as far as practicable, and existing permits and licences, and appropriate arrangements will be made for 'transitioning' existing permits to the extent that they fall within the outer limit of the territorial sea.

Offshore mining for other minerals

Arrangements for the mining of offshore minerals other than petroleum will be the same as for offshore petroleum.

Commonwealth and State legislation embodying a common mining code will be needed to implement the arrangements. Arrangements will also be made for sharing royalties.

Commonwealth-Western Australian Offshore Petroleum Joint Authority

Special Agreement relating to its establishment, Premiers Conference

1. Present Commonwealth legislation would be amended to provide for the establishment of a Joint Authority consisting of the State Minister and the Commonwealth Minister. Under these arrangements applications will be made to the State Minister. The day-to-day administration will remain with the State.

2. Having regard to the special position of Western Australia, special provisions are agreed in the case of the Western Australian Joint Authority as follows:

- (a) Headquarters of the Joint Authority will be located at Perth.
- (b) In the event of disagreement, the Commonwealth has power to veto decisions proposed by the State where the decision would endanger or prejudice the national interest.
- (c) If the Commonwealth Minister proposes to recommend the exercise of the power of veto, he shall communicate this proposal to the State Minister as soon as practicable but within 30 days and he shall specify in what respect the national interest would be endangered or prejudiced.
- (d) Should the State Premier wish to do so, he may make representations to the Prime Minister who after consideration by the Cabinet shall be responsible for resolution of the issue.
- (e) Distribution of functions would be the same as for other States but subject to the above.

29 June 1979

marine resources presents both an opportunity and a challenge for ensuring long-term ecological sustainability.

18. AUSTRALIA'S OCEAN ENVIRONMENTS

Australia's vast marine jurisdictions range from the Torres Strait in the north to Antarctica in the south, Norfolk Island in the east to Heard and McDonald Islands in the southwest. As part of three large, interconnected ocean areas—the Pacific, Indian and Southern Oceans—our waters cover all of the Southern Hemisphere's ocean temperature zones.

The Australian mainland is surrounded by a continental shelf between 15 and 400 kilometres wide, with major marine canyon systems of the continental slope leading to the deep seabed and abyssal plains of our deeper waters.

Australia is one of the most biologically diverse nations on earth and our marine environment is home to a spectacular array of species, many of which are unique to Australian waters. In the southern temperate waters as many as 80 per cent of species are not found elsewhere, that is, they are endemic. In the north, which is connected by currents to the Indian and Pacific Oceans, although overall diversity is higher, the proportion of endemic species is lower, at around ten per cent.

OFFSHORE PETROLEUM:

PARTNERSHIPS IN MANAGING RESOURCES ACROSS JURISDICTIONAL BOUNDARIES

In Australia, as in some other countries, considerable effort has been invested in developing arrangements for coordination between Federal and State Government responsibilities offshore. One of the most successful examples is the arrangement for managing offshore petroleum exploration and development activities.

There are two main features of the Australian offshore petroleum regime that account for its success—mirror legislation and Commonwealth-State co-management.

The Commonwealth *Petroleum (Submerged Lands) Act 1967* (the P(SL)A) applies in Commonwealth waters—areas more than three nautical miles from the territorial sea baselines. Mirror legislation, that is, essentially identical State or Northern Territory legislation, applies landward of this, adjacent to the relevant State or the Northern Territory. This means that a common set of arrangements is in place from the low water mark to the edge of the continental shelf. This creates a consistent policy framework regardless of the location of petroleum activity and implements the “common mining code” requirement of the Offshore Constitutional Settlement.

The second feature, co-management, is achieved through Joint Authorities for the adjacent areas in Commonwealth waters off each State and the Northern Territory under the P(SL)A. Each Joint Authority, comprised of the Commonwealth and relevant State or Northern Territory resource ministers, is the peak decision-making body responsible for managing petroleum exploration and production in its adjacent area. This means that both levels of government are jointly involved in the management of offshore petroleum development in Commonwealth waters.

In summary, a nationally consistent regime for managing Australian offshore petroleum activities is ensured through the Commonwealth membership of all the Joint Authorities and the use of mirror legislation.

The Australian offshore petroleum regime is a highly successful system for managing offshore resources. It recognises that management of offshore petroleum resources requires cooperation between the Commonwealth, States and the Northern Territory, and provides the basis for achieving this on a nationally uniform basis. It is a leading example of joint Commonwealth-State natural resource management.

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6.5. OCEANS POLICY BACKGROUND PAPERS

- #1 Oceans Facts and Figures: A Primer on Australia's Oceans and Exclusive Economic Zone.
- #2 Review of International Agreements, Conventions, Obligations and Other Instruments Influencing Use and Management of Australia's Marine Environment.
- #3 Analysis of Submissions to the Oceans Policy Consultation Paper.
- #4 Analysis of Marine and Coastal Reviews and their Recommendations in Relation to Development of an Oceans Policy for Australia.

6.6. OCEANS POLICY ISSUES PAPERS

- #1 Multiple Use Management in the Australian Marine Environment: Principles, Definitions and Elements.
- #2 Management Instruments for Marine Resource Allocation and Use.
- #3 Best Practice Mechanisms for Marine Use Planning.
Oceans Planning & Management: Summary of Issues Papers 1, 2 and 3.
- #4 Caring for the Commons. Socio-cultural Considerations in Oceans Policy Development and Implementation.
- #5 Expanding the Role of Collaborative Management and Stewardship in the Conservation Management of Australia's Marine and Coastal Resources.
- #6 Saltwater Country: Aboriginal and Torres Strait Islander Interest in Ocean Policy Development and Implementation.
- #7 Conservation of Marine Biological Diversity.